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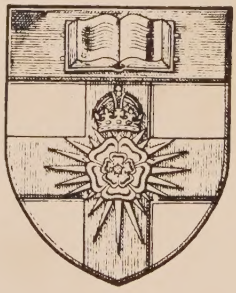

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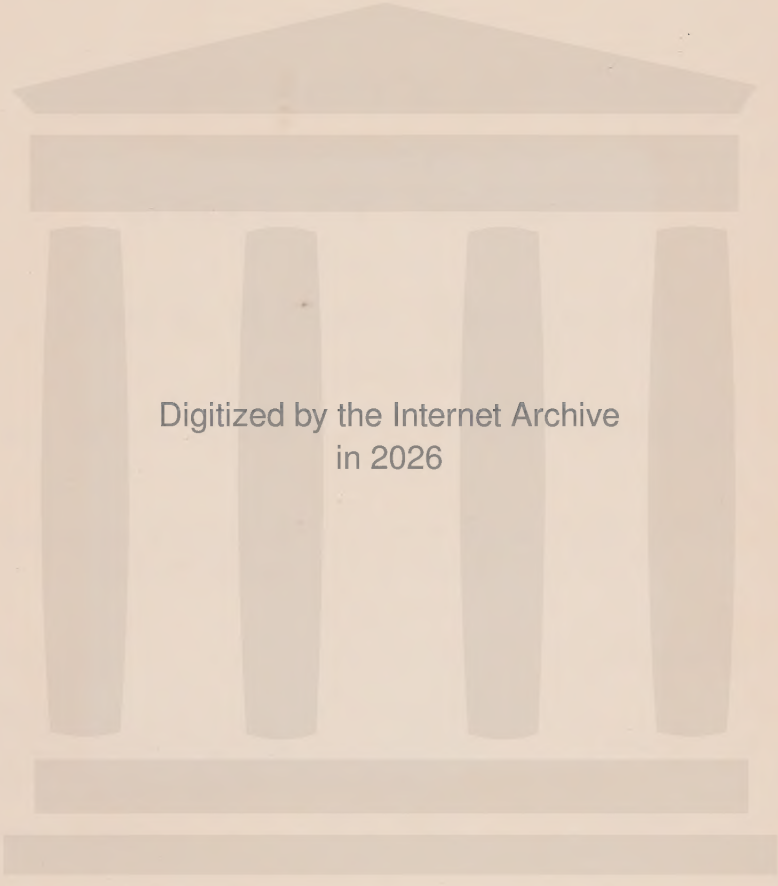

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1897.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1897.

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OF

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OF

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1897.

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[1897] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aktieselkab Helios *v.* Ekman & Co. (C. A.)	83
Andrews *v.* Denton	37
Arrow, Murphy *v.*	527
Attorney-General *v.* Beech	535
——— *v.* Dodington (C. A.)	373
——— *v.* Newcastle-upon-Tyne Corporation (C. A.)	384
——— *v.* Wood	102
——— *v.* Wright (C. A.)	318

B.

Barnard, Watkins *v.*	521
Beech, Attorney-General *v.*	535
Berlin, Court *v.* (C. A.)	396
Brash, Hope *v.* (C. A.)	188
Broster, In re. Ex parte Pruddah	429
Burton, Reg. *v.* Ex parte Young	468

C.

	PAGE
Carlton Steamship Company *v.* Castle Mail Packets Company (C. A.)	485
Castle Mail Packets Company, Carlton Steamship Company *v.* (C. A.)	485
Clowser, Forster *v.* (C. A.)	362
Coats *v.* Inland Revenue Commissioners (C. A.)	423
Commercial Press Telegram Bureaux, Liverpool General Brokers' Association *v.*	1
Conroy *v.* Peacock	6
Court *v.* Berlin (C. A.)	396
Cowley's (Earl) Estate, In re	47

D.

Davies, Grand Junction Waterworks Company *v.*	209
———, Reg. *v.* (C. C. R.)	199
Denton, Andrews *v.*	37
Dodington, Attorney-General *v.* (C. A.)	373

PAGE

Downton, Wilkinson *v.* 57
Durham (Lord Bishop), Reg. *v.* (C. A.) 414

E.

Eaton & Co, In re. Ex parte Viney 16
Edwards *v.* Steel, Young & Co. (C. A.) 327
Ekman & Co., Aktieselkab Helios *v.* (C. A.) 83
Evans & Co., James *v.* 180
Eversfield, King *v.* (C. A.) 475

F.

Firth *v.* Staines 70
Fontes, Machado *v.* (C. A.) 231
Forster *v.* Clowser (C. A.) 362
Fort, In re. Ex parte Schofield (C. A.) 495
Fortescue *v.* Mercantile Bank of London (C. A.) 236
France, Thornton *v.* (C. A.) 143
Frankenstein *v.* Gavin's House-to-House Cycle Cleaning and Insurance Company (C. A.) 62
Fulham Vestry *v.* London County Council 76

G.

Gallard, In re. Ex parte Gallard 8
Gandy, Southport Tramways Company *v.* (C. A.) 66
Gavin's House-to-House Cycle Cleaning and Insurance Company, Frankenstein *v.* (C. A.) 62
Ginger, In re. Ex parte London and Universal Bank 461
Gordon, In re. Ex parte Navalchand 516

PAGE

Grand Junction Waterworks Company *v.* Davies 209
Greenwell *v.* Low Beechburn Coal Company 165
Griffin, Stevens *v.* (C. A.) 368
Grosvenor and West End Railway Terminus Hotel Company, Spokes *v.* (C. A.) 124

H.

Hatton *v.* Treeby 452
Hope *v.* Brash (C. A.) 188
Hunt *v.* Hunt 304
——— (C. A.) 547
Hunting, New, Prance and Garrard's Trustee *v.* (C. A.) 19

I.

Imray *v.* Oakshette (C. A.) 218
Inland Revenue Commissioners, Coats *v.* (C. A.) 423

Mersey Docks and Harbour Board *v.* (C. A.) 316

Rowell *v.* 194

J.

James *v.* Evans & Co. 180

K.

Kempton Park Racecourse Company, Powell *v.* (C. A.) 242
Kerr *v.* Kerr 439
Kerrison *v.* Smith 445
King *v.* Eversfield (C. A.) 475

L.

Lacon & Co, Ex parte. Reg. *v.* Thornton 308

PAGE

Leeds Permanent Benefit Building Society *v.* Mallandaine (C. A.) 402
Liverpool General Brokers' Association *v.* Commercial Press Telegram Bureaux 1
Llewellyn *v.* Vale of Glamorgan Railway Company 239
London and Universal Bank, Ex parte. In re Ginger 461
London Assurance, Ruabon Steamship Company *v.* 456
London County Council, Fulham Vestry *v.* 76

v. Wood 482
Low Beechburn Coal Company, Greenwell *v.* 165

M.

Macaulay *v.* Polley (C. A.) 122
Machado *v.* Fontes (C. A.) 231
Mallandaine, Leeds Permanent Benefit Building Society *v.* (C. A.) 402
Malling Rural Council, Simmons *v.* 433
Medical Council, Reg. *v.* (C. A.) 203
Mercantile Bank of London, Fortescue *v.* (C. A.) 236
Merchants Marine Insurance Company, Universo Insurance Company of Milan *v.* (C. A.) 93
Mersey Docks and Harbour Board *v.* Inland Revenue Commissioners (C. A.) 316
Merthyr Tydfil Urban Council, Seal *v.* 543
Mexborough (Earl of) *v.* Whitwood Urban District Council (C. A.) 111
Murphy *v.* Arrow 527

N.

Navalchand, Ex parte. In re Gordon 516

PAGE

New, Prance and Garrard's Trustee *v.* Hunting (C. A.) 19
Newcastle-upon-Tyne Corporation, Attorney-General *v.* (C. A.) 384
Nottingham Corporation, In re 502

O.

Oakshette, Imray *v.* (C. A.) 218

P.

Peacock, Conroy *v.* 6
Pelly, Reg. *v.* 33
Polley, Macaulay *v.* (C. A.) 122
Powell *v.* Kempton Park Racecourse Company (C. A.) 242
Press Association, Stone *v.* (C. A.) 159
Pruddah, Ex parte. In re Broster 429

R.

Raatz, In re. Ex parte Raatz 80
Reg. *v.* Burton. Ex parte Young 468
—— *v.* Davies (C. C. R.) 199
—— *v.* Durham (Lord Bishop) (C. A.) 414
—— *v.* Medical Council (C. A.) 203
—— *v.* Pelly 33
—— *v.* Thornton. Ex parte Lacon & Co. 308
Rowell *v.* Inland Revenue Commissioners 194
Royal Exchange Assurance Corporation, Ruys *v.* 135
Ruabon Steamship Company *v.* London Assurance 456
Ruys *v.* Royal Exchange Assurance Corporation 135

S.

PAGE
Schofield, Ex parte. In re Fort (C. A.) 495
Seal *v.* Merthyr Tydfil Urban Council 543
Simmons *v.* Malling Rural Council 433
Small *v.* United Kingdom Marine Mutual Insurance Association 42
——————————————
(C. A.) 311
Smeed, Dean & Co., Thames Conservators *v.* (C. A.) 334
Smith, Kerrison *v.* 445
Southport Tramways Company *v.* Gandy (C. A.) 66
Spokes *v.* Grosvenor and West End Railway Terminus Hotel Company (C. A.) 124
Staines, Firth *v.* 70
Steel, Young & Co., Edwards *v.* (C. A.) 327
Stevens *v.* Griffin (C. A.) 368
Stone *v.* Press Association (C. A.) 159

T.

Thames Conservators *v.* Smeed, Dean & Co. (C. A.) 334
Thornton *v.* France (C. A.) 143
————, Reg. *v.* Ex parte Lacon & Co. 308
Treeby, Hatton *v.* 452

U.

PAGE
United Kingdom Marine Mutual Insurance Association, Small *v.* 42
——————————————
(C. A.) 311
Universo Insurance Company of Milan *v.* Merchants Marine Insurance Company (C. A.) 93

V.

Vale of Glamorgan Railway Company, Llewellyn *v.* 239
Viney, Ex parte. In re Eaton & Co. 16

W.

Watkins *v.* Barnard 521
Whitwood Urban District Council, Mexborough (Earl of) *v.* (C. A.) 111
Widnes Corporation, Wood *v.* 357
Wilkinson *v.* Downton 57
Wood, Attorney-General *v.* 102
———--, London County Council *v.* 482
———-- *v.* Widnes Corporation 357
Wright, Attorney-General *v.* (C. A.) 318

Y.

Young, Ex parte. Reg. *v.* Burton 468

TABLE OF CASES CITED.

A.

		PAGE
Acton *v.* Woodgate	2 My. & K. 492	23
Alabama (State of) *v.* Georgia (State of)	64 U. S. 515	338
Alderson *v.* Bolckow, Vaughan & Co.	Not reported	170
Alhambra, The	6 P. D. 68	489
Allhusen *v.* Labouchere	3 Q. B. D. 654	131
Allinson *v.* Medical Council	[1894] 1 Q. B. 750	470
Allsop *v.* Allsop	5 H. & N. 534	57
Ashby, In re	[1892] 1 Q. B. 872	23
Attorney-General *v.* Chapman	[1891] 2 Q. B. 526	51
—— —— —— *v.* Emerson	10 Q. B. D. 191	64, 385
—— —— —— *v.* London Corporation	2 Mac. & G. 247	385
—— —— —— *v.* Resby	Hardr. 377	506
—— —— —— *v.* Robertson	[1893] 1 Q. B. 293	110
Atwool *v.* Merryweather	L. R. 5 Eq. 464, n.	128

B.

Badeley *v.* Consolidated Bank	38 Ch. D. 238	497
Bailey *v.* Bailey	13 Q. B. D. 855	441
Bainbridge *v.* Neilson	10 East, 329	137
Baker, Ex parte	7 E. & B. 697; 2 H. & N. 219; 26 L. J. (M.C.) 155, 193	187
Ball, Ex parte	35 W. R. 264	24
Bank of England *v.* Vagliano	[1891] A. C. 107	346
Barker *v.* Smark	7 M. & W. 590	197
Barnsley *v.* Taylor	37 L. J. (Q.B.) 39	187
Barnsley Local Board *v.* Sedgwick	L. R. 2 Q. B. 185	73
Bell *v.* Great Northern Railway Company of Ireland	26 L. R. Ir. 428	60
Blundell *v.* Catterall	5 B. & A. 268	319
Bogle *v.* Sherborne Local Board	46 J. P. 675	360
Bond *v.* Plumb	[1894] 1 Q. B. 169	274
Bonomi *v.* Backhouse	E. B. & E. 622; 9 H. L. C. 503	170
Bows *v.* Fenwick	L. R. 9 C. P. 339	251
Bradford *v.* Eastbourne Corporation	[1896] 2 Q. B. 205	543
Braybrooke (Lord) *v.* Attorney-General	9 H. L. C. 150	51
Bristol Waterworks Company *v.* Uren	15 Q. B. D. 637	212
British India Steam Navigation Company *v.* Inland Revenue Commissioners	7 Q. B. D. 165	197
Brotherston *v.* Barber	5 M. & S. 418	136
Brown *v.* Cole	14 Sim. 427	363
Brunsden *v.* Humphrey	14 Q. B. D. 141	187
Bryan *v.* Whistler	8 B. & C. 288	447

		PAGE
Burchard *v.* Macfarlane	[1891] 2 Q. B. 241	125
Burstall *v.* Beyfus	26 Ch. D. 35	125
Busby *v.* Chesterfield Waterworks and Gaslight Company	E. B. & E. 176; 27 L. J. (M.C.) 174	214
Bustros *v.* White	1 Q. B. D. 423	188
Butler *v.* Manchester, Sheffield and Lincolnshire Railway	21 Q. B. D. 207	450
—— *v.* Wearing	17 Q. B. D. 182	518

C.

Cartwright *v.* Green	8 Ves. 405	131
Chambers *v.* Coleman	9 Dowl. 588	430
Cheesebrough, In re	L. R. 12 Eq. 358	17
Chester (Company of Mercers and Ironmongers of) *v.* Bowker	1 Str. 639	470
Chester *v.* Wortley	17 C. B. 410	112
Chetwynd *v.* Lindon	2 Ves. Sen. 450	131
Chinnery *v.* Evans	11 H. L. C. 115	147
Cholmeley School, Highgate (Wardens of) *v.* Sewell	[1894] 2 Q. B. 906	220
Chown *v.* Parrott	14 C. B. (N.S.) 74; 32 L. J. (C.P.) 197	122
Clay & Sons, In re	3 Manson, 31	16
Clemson *v.* Hubbard	1 Ex. D. 179	185
Clerical Medical and General Life Assurance Society *v.* Carter	22 Q. B. D. 444	407
Colchester Corporation *v.* Brooke	7 Q. B. 339	345
Cologan *v.* London Assurance Company	5 M. & S. 447	137
Colonial Bank *v.* Whinney	11 App. Cas. 426	463
Cornish, In re	[1896] 1 Q. B. 99	11
—— *v.* Stubbs	L. R. 5 C. P. 334	447
Cowley's (Earl) Estate, In re	[1897] 2 Q. B. 47	538
Cox *v.* Hickman	8 H. L. C. 268	497
Cutler *v.* Turner	L. R. 9 Q. B. 502	187
Cutter *v.* Powell	2 Sm. L. C. 10th ed. p. 1	187

D.

Dahl *v.* Nelson, Donkin & Co.	6 App. Cas. 38	488
Dalton *v.* Angus	6 App. Cas. 740	171
Davis *v.* Treharne	6 App. Cas. 460	165
Day *v.* Drake	3 Sim. 64	125
Dean *v.* Hornby	3 E. & B. 180	137
De Blaquière *v.* De Blaquière	3 Hagg. Ecc. 322	443
Doe *v.* Eyre	17 Q. B. 366	147
—— *v.* Grafton	18 Q. B. 496	475
—— *v.* Massey	17 Q. B. 373	143
Doggett *v.* Catterns	17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765	252
Duffy *v.* Hanson	61 L. T. 332	123
Dumpor's Case	4 Rep. 119	120

E.

East India Company *v.* Campbell	1 Ves. Sen. 246	130
Eastwood *v.* Miller	L. R. 9 Q. B. 440	252
Ebbs *v.* Boulnois	L. R. 10 Ch. 479	223

		PAGE
Edgar *v.* Bumstead	1 Camp. 411	97
—— *v.* Fowler	3 East, 222	97
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	15
Eyre *v.* Walsh	10 Ir. C. L. Rep. 346	148

F.

Falkner *v.* Ritchie	2 M. & S. 290	139
Fearon *v.* Aylesford (Earl)	14 Q. B. D. 792	306, 548
Fentiman *v.* Smith	4 East, 107	447
Fenton *v.* Hughes	7 Ves. 287	125
Fisher *v.* Owen	8 Ch. D. 645	131
Fitch *v.* Rawling	2 H. Bl. 394	319
Fletcher *v.* Rodgers	27 W. R. 97	548
Flower *v.* Flower	20 W. R. 231	548
Ford *v.* Ager	2 H. & C. 279	147
Foster *v.* Inland Revenue Commissioners	[1894] 1 Q. B. 516	425
Fray *v.* Vowles	1 E. & E. 839; 28 L. J. (Q.B.) 232	122
Free Fishers of Whitstable *v.* Foreman	L. R. 3 C. P. 578	320
Freshney *v.* Carrick	1 H. & N. 653	463

G.

Gallaway *v.* Maries	8 Q. B. D. 275	251
Gann *v.* Free Fishers of Whitstable	11 H. L. C. 192	319
Garrard *v.* Lauderdale (Lord)	3 Sim. 1	23
General Steam Navigation Company *v.* Slipper	11 C. B. (N.S.) 493	488
Gibbs *v.* Glamis	11 Sim. 584	23
Godsall *v.* Boldero	9 East, 72	135
Goodman *v.* Pocock	15 Q. B. 576	183
—— *v.* Saltash Corporation	7 App. Cas. 633	324
Goolden *v.* Thames Conservators	Unreported	338
Goslings *v.* Blake	23 Q. B. D. 324	407
Gould, In re	19 Q. B. D. 92	523
Gourand *v.* Edison Gower Telephone Company	57 L. J. (Ch.) 498	125
Great Western Railway *v.* Inland Revenue Commissioners	[1894] 1 Q. B. 507	424
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	407
Grey's Brewery Company, In re	56 L. T. 298	237
Griffiths, Ex parte	3 D. M. & G. 174	81
Grimbly *v.* Aykroyd	1 Ex. 479	187

H.

Haigh *v.* Sheffield Town Council	L. R. 10 Q. B. 102	200, 252
Halley, The	L. R. 2 P. C. 193	232
Halton *v.* Cove	1 B. & Ad. 538	272
Hamilton *v.* Mendes	2 Burr. 1198	136
Hardy *v.* Fothergill	13 App. Cas. 351	441
Hargreaves *v.* Taylor	3 B. & S. 613	359
Harris, Ex parte	21 Q. B. D. 38	237
—— *v.* Mobbs	3 Ex. D. 268	61
Hartley *v.* Harman	11 A. & E. 798	183
Hawke *v.* Dunn	[1897] 1 Q. B. 579	243

		PAGE
Hawkins, In re	[1894] 1 Q. B. 25	440
Heap *v.* Burnley Union	12 Q. B. D. 617	436
Heath *v.* Pugh	6 Q. B. D. 345	148
Hennessy *v.* Wright	24 Q. B. D. 445	188
Henretty *v.* Hart	13 Rettie, Court of Justiciary Cases, 4th Series, 9	253
Hewlins *v.* Shippam	5 B. & C. 221	447
Hill *v.* Hair	[1895] 1 Q. B. 906	543
Hindson *v.* Ashby	[1896] 2 Ch. 1	338
Hobbs *v.* Hannam	3 Camp. 93	44, 313
Hobbs & Co. *v.* Hudson	25 Q. B. D. 232	113
Hochster *v.* De la Tour	2 E. & B. 678	187
Holdsworth *v.* Wyse	7 B. & C. 794	139
Holman *v.* Wade	The Times, May 11, 1877	85
Hornsby *v.* Raggett	[1892] 1 Q. B. 20	253
Hunnings *v.* Williamson	10 Q. B. D. 459	112
Hunt *v.* Hunt	4 D. F. & J. 221	306
—— *v.* ——	28 Ch. D. 606	306

I.

Ind, Coope & Co. *v.* Emmerson	12 App. Cas. 300	114
Irving *v.* Richardson	2 B. & Ad. 193	45
Izard, Ex parte	23 Ch. D. 409	463

J.

Jenks *v.* Turpin	13 Q. B. D. 505	200, 528
Johns *v.* James	8 Ch. D. 744	23
Jones *v.* Boyce	1 Stark. 493	61
—— *v.* Nicholson	10 Ex. 28; 23 L. J. (Ex.) 330	44
—— *v.* Owen	2 D. & R. 600	453
—— *v.* Williams	2 M. & W. 326	390
Joy *v.* Campbell	1 Sch. & Lef. 328	462

K.

Kelly, Ex parte	11 Ch. D. 306	24
Kemp *v.* Derrett	3 Camp. 509	477
Keyworth, In re	L. R. 9 Ch. 379	516
King and Beesley, In re	[1895] 1 Q. B. 189	81

L.

Lamb *v.* Walker	3 Q. B. D. 389	171
Langridge *v.* Levy	2 M. & W. 519	58
Laugher *v.* Pointer	5 B. & C. 547	176
Leeson *v.* Medical Council	43 Ch. D. 366	469
Lester *v.* Torrens	2 Q. B. D. 403	33
Liddell *v.* Lofthouse	[1896] 1 Q. B. 295	253
Linton *v.* Linton	15 Q. B. D. 239	440
Lowe *v.* Lambeth Waterworks Company	Not reported	214
Lozano *v.* Janson	2 E. & E. 160	140
Lyell *v.* Kennedy	8 App. Cas. 217	112
Lynch *v.* Knight	9 H. L. C. 577	59
Lyon *v.* Fishmongers' Company	1 App. Cas. 662	354

M.

		PAGE
MacAllister *v.* Rochester (Bishop)	5 C. P. D. 194	125
Maccallum *v.* Turton	2 Y. & J. 183	131
MacDougall *v.* Gardiner	1 Ch. D. 13	128
McWilliam *v.* Dawson	56 J. P. 182	296
Maple & Co. *v.* Shrewsbury and Talbot (Earl)	19 Q. B. D. 463	517
Marine Insurance Company *v.* China TransPacific Steamship Company	11 App. Cas. 573	456
Martin *v.* Treacher	16 Q. B. D. 507	112
Mason *v.* Harris	11 Ch. D. 97	128
Matthew, Ex parte	12 Q. B. D. 506	81
May *v.* Hawkins	11 Ex. 210	113
Mellor *v.* Watkins	L. R. 9 Q. B. 400	447
Menier *v.* Hooper's Telegraph Works	L. R. 9 Ch. 350	128
Mersey Docks and Harbour Board *v.* Llaneilian Overseers	14 Q. B. D. 770	214
Mersey Steel and Iron Company *v.* Naylor, Benzon & Co.	9 App. Cas. 434	183
Metcalfe *v.* Britannia Ironworks Company	2 Q. B. D. 423	488
Metropolitan Bank *v.* Heiron	5 Ex. D. 319.	12
Middleton *v.* Pollock	2 Ch. D. 104	20
Mills, Ex parte.	L. R. 8 Ch. 569	497
Mills' Trusts, In re	[1895] 2 Ch. 564	463
Mitchell *v.* Darley Main Colliery Company	14 Q. B. D. 125; 11 App. Cas. 127	172
——— *v.* R. R. Co.	151 N. Y. 107	60
M. Moxham, The	1 P. D. 107	231
Molloy *v.* Kilby	15 Ch. D. 162	125
Moojen, In re	12 Ch. D. 26	517
Moore, Ex parte	51 L. J. (Ch.) 72; 45 L. T. 558.	8, 11
Morritt, In re	18 Q. B. D. 222	364
Mostyn *v.* Fabrigas	1 Cowp. 161	232
Murphy *v.* Murphy	15 Ir. C. L. Rep. 205	148

N.

Naylor *v.* Taylor	9 B. & C. 718	139
Neill *v.* Devonshire (Duke)	8 App. Cas. 135	389
Nifa, The	[1892] P. 411	85
Nind *v.* Nineteenth Century Building Society	[1894] 2 Q. B. 226	221
Noel *v.* Noel	1 D. J. & S. 468	388

O.

Orme *v.* Crockford	13 Price, 376.	116
Orr *v.* Diaper	4 Ch. D. 92	125

P.

Parker *v.* Winlow	7 E. & B. 942	488
Pasley *v.* Freeman	3 T. R. 51	58
Patman *v.* Harland	17 Ch. D. 353	221
Patterson *v.* Ritchie	4 M. & S. 393	137
Paxton *v.* Douglas	19 Ves. 225	131

		PAGE
Pearce *v.* Bunting	[1896] 2 Q. B. 360	334
——— *v.* Watkins	2 F. & F. 377	363
Petersen *v.* Freebody & Co.	[1895] 2 Q. B. 294	85
Phillips *v.* Eyre	L. R. 6 Q. B. 1	231
Pooley *v.* Driver	5 Ch. D. 458	498
Powell *v.* Boraston	18 C. B. (N.S.) 175	266
Power *v.* Butcher	10 B. & C. 329	94
Prescott *v.* Prescott	20 L. T. 331	443
Price *v.* James	[1892] 2 Q. B. 428	39
Procurator-General *v.* Stone	1 Hagg. Cons. 424	416
Pugh *v.* Heath	7 App. Cas. 235	156
—— *v.* London, Brighton and South Coast Railway Company	[1896] 2 Q. B. 248	60
Pye *v.* Butterfield	5 B. & S. 829	111

R.

Radcliffe, In re	[1892] 1 Ch. 227	538
Ramsden *v.* Brearley	33 L. T. 322	125
Rankin *v.* Potter	L. R. 6 H. L. 83	136
Read, Ex parte	[1897] 1 Q. B. 122	24
Redfern *v.* Redfern	[1891] P. 139	131
Reedie *v.* London and North Western Railway	4 Ex. 244	177
Reg. *v.* Allan	4 B. & S. 915	470
—— *v.* Cook	13 Q. B. D. 377	250
—— *v.* Deal Corporation	45 L. T. (N.S.) 439	470
—— *v.* Fraser	9 Times L. R. 613	470
—— *v.* Gaisford	[1892] 1 Q. B. 381	470
—— *v.* Hammond	9 L. T. (N.S.) 423	470
—— *v.* Hastings Corporation	[1897] 1 Q. B. 46	544
—— *v.* Henley	[1892] 1 Q. B. 504	469
—— *v.* Huggins	[1895] 1 Q. B. 563	469
—— *v.* Liverpool Justices	11 Q. B. D. 638	40
—— *v.* Parlby	22 Q. B. D. 520	77
—— *v.* Portugal	16 Q. B. D. 487	251
—— *v.* Preedy	17 Cox, 433	253
Rex *v.* Dover	1 C. M. & R. 726	505
—— *v.* Horndon-on-the-Hill (Inhabitants)	4 M. & S. 562	447
Reynolds & Co. *v.* Tomlinson	[1896] 1 Q. B. 586	488
Rochefoucauld *v.* Boustead	[1897] 1 Ch. 196	15
Rodocanachi *v.* Elliott	L. R. 9 C. P. 518; 31 L. T. 239	136, 137
Rowley *v.* Rowley	L. R. 1 H. L. (Sc.) 63	548
Rylands *v.* Fletcher	L. R. 3 H. L. 330	178
Rymer *v.* McIlroy	[1897] 1 Ch. 528	447

S.

St. Helen's Chemical Company *v.* St. Helen's Corporation	1 Ex. D. 196	77
St. James and St. John, Clerkenwell Vestry *v.* Feary	24 Q. B. D. 703	360
St. Luke's Vestry *v.* Lewis	1 B. & S. 865	359
Schilizzi *v.* Derry	4 E. & B. 873	488
Scott *v.* Seymour (Lord)	1 H. & C. 219	232
Seaward *v.* Dennington	44 W. R. 696	111, 131

		PAGE
Self *v.* Hove Commissioners	[1895] 1 Q. B. 685	544
Shaw *v.* Morley	L. R. 3 Ex. 137	251
—— *v.* Smith	18 Q. B. D. 193	125
Shield *v.* Wilkins	5 Ex. 304	488
Shrapnel *v.* Laing	20 Q. B. D. 334	370
Slater, Ex parte	64 T. L. R. 426	463
Slattery *v.* Naylor	13 App. Cas. 446	436
Smith *v.* Buller	L. R. 19 Eq. 473	370
—— *v.* Hurst	10 Hare, 30	23
—— *v.* Johnson & Co.	Unreported	61
—— *v.* Robertson	2 Dow. 474	139
Snow *v.* Hill	14 Q. B. D. 588	253
Soar *v.* Ashwell	[1893] 2 Q. B. 390	12
Spackman *v.* Miller	12 C. B. (N.S.) 659	463
Stanley, In re	17 L. R. Ir. 487	463
Stowel *v.* Zouch (Lord)	Plowd. 353	272
Sully, Ex parte	14 Q. B. D. 950	463
Sutton *v.* Sutton	22 Ch. D. 513	265
Swift *v.* Pannell	24 Ch. D. 210	463
Synnot *v.* Simpson	5 H. L. C. 121	23

T.

Tapscott *v.* Balfour	L. R. 8 C. P. 46	488
Taylor, Ex parte	18 Q. B. D. 295	24
——, Ex parte	12 Ch. D. 366	500
Tharsis Sulphur and Copper Company *v.* Morel Brothers & Co.	[1891] 2 Q. B. 647	488
Thomas *v.* Everard	6 H. & N. 448; 30 L. J. (Ex.) 214	306, 548
Threlfall, In re	16 Ch. D. 274	477
Thwaites *v.* Coulthwaite	[1896] 1 Ch. 496	251
Tidball *v.* James	29 L. J. (Ex.) 91	148
Tinkler *v.* Wandsworth District Board of Works	2 De G. & J. 261	357
Travis *v.* Uttley	[1894] 1 Q. B. 233	544
Tuck *v.* Canton	51 L. J. (Q.B.) 363	5
Tucker *v.* Rees	25 J. P. 789	436

U.

Underwood, Son and Piper *v.* Lewis	[1894] 2 Q. B. 306	397
Unwin *v.* Clarke	L. R. 1 Q. B. 417	187
Uxbridge (Lord) *v.* Staveland	1 Ves. Sen. 56	112

V.

Vaughan *v.* Hampson	33 L. T. (N.S.) 15	447
Victorian Railways Commissioners *v.* Coultas	13 App. Cas. 222	57

W.

Waite *v.* Garston Local Board	L. R. 3 Q. B. 5	436
Warrender *v.* Warrender	2 C. & F. 488	548
Watkins *v.* Watkins	[1896] P. 222	441

		PAGE
Waugh *v.* Carver	2 H. Bl. 235	498
Webb *v.* East	5 Ex. D. 23	131
Wells, In re	68 L. T. 231	430
—— *v.* Kingston-upon-Hull Corporation	L. R. 10 C. P. 402	446
West Middlesex Waterworks Company *v.* Coleman	14 Q. B. D. 529	214
Whitchurch, Ex parte	6 Q. B. D. 545; 7 Q. B. D. 534	359
Whitehouse *v.* Fellowes	10 C. B. (N.S.) 765	174
Wilkins *v.* Day	12 Q. B. D. 110	61
Wilson *v.* Balfour	2 Camp. 579	24
—— *v.* Wilson	3 Hagg. Eccl. 329, n.	441
Wood *v.* Boosey	L. R. 2 Q. B. 340	1
—— *v.* Leadbitter	13 M. & W. 838	445
Worsley *v.* Labouchere	28 L. J. (N.C.) 879	370
Wroughton *v.* Turtle	11 M. & W. 561	196

X.

Xenos *v.* Wickham	14 C. B. (N.S.) 435	95

Y.

Youle *v.* Mappin	30 L. J. (M.C.) 234	187

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1897.

LIVERPOOL GENERAL BROKERS' ASSOCIATION, LIMITED *v.* COMMERCIAL PRESS TELEGRAM BUREAUX, LIMITED.

1897
Feb. 20.

Copyright — Assignment — Infringement — Right of Unregistered Assignee to Sue — Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 13, 24.

The assignee of a copyright under 5 & 6 Vict. c. 45, must be registered before he can maintain an action for its infringement.

Dictum of Cockburn C.J. in *Wood* v. *Boosey*, (1867) L. R. 2 Q. B. 340, not followed.

ACTION tried before Kennedy J. without a jury.

The plaintiffs sued as proprietors of two publications known as "The Liverpool Daily Commercial Report" and "The Liverpool General Brokers' Association Prices Current" for damages for the infringement of their copyright, and for an injunction.

1897

LIVERPOOL GENERAL BROKERS' ASSOCIATION v. COMMERCIAL PRESS TELEGRAM BUREAUX.

It appeared that by a valid assignment in writing the original proprietors of the copyright in these publications had assigned the copyright in them to the plaintiffs. The plaintiffs were not assignees by entry in the registry book of the Stationers' Company under s. 13 of the Copyright Act, 1842, and they had not before bringing this action caused an entry to be made on such registry book in accordance with s. 24 of that Act. (1) Other points were raised in the case, but the only question which it is necessary to report is whether under these circumstances the plaintiffs could maintain the action.

Pickford, Q.C. (*Horridge* and *R. B. Lawrence* with him), for the plaintiffs. The plaintiffs are the proprietors of the copyright under a valid assignment from a duly registered proprietor. They have, therefore, the right to maintain this action, and it is not necessary that they should themselves be registered as proprietors. The point was expressly decided by Cockburn C.J. in *Wood* v. *Boosey*. (2) It could not be intended by the Legislature that the assignee of a copyright must procure his own registration as proprietor before he is entitled to sue, since no power is given him to compel his assignor to effect the alteration on the register.

Bigham, Q.C., and *G. H. Duncan*, for the defendants. The action cannot be maintained. The plaintiffs do not appear on the face of the register either as assignees or as proprietors of the copyright. Sect. 24 of the Copyright Act, 1842, is in

(1) By the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 13, "It shall be lawful for the proprietor of copyright in any book . . . . hereafter to be published to make entry in the registry book of the Stationers' Company of the title of such book . . . . and the name and place of abode of the proprietor of the copyright of the said book . . . . and it shall be lawful for every such registered proprietor to assign his interest . . . . by making entry in the said book of registry of such assignment and of the name and place of abode of the assignee thereof . . . . and such assignment so entered . . . . shall be of the same force and effect as if such assignment had been made by deed."

By s. 24, "No proprietor of copyright in any book . . . . shall maintain any action or suit . . . . in respect of any infringement of such copyright unless he shall before commencing such action or suit have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to this Act."

(2) L. R. 2 Q. B. 340, at p. 351.

express terms. The plaintiffs, although assignees, are proprietors of the copyright within the terms of that section, and they are therefore not entitled to sue until they have registered the book under that section.

The remarks of Cockburn C.J. in *Wood* v. *Boosey* (1) were obiter dicta, and are not binding on this Court.

Cur. adv. vult.

Feb. 20. KENNEDY J., after reviewing the facts, on which he came to the conclusion that there had been an infringement of the copyright by the defendants in both cases, continued:—But then the important question arises: Are the plaintiffs entitled to maintain this action? The defendants say that they are not; and I regret to be compelled to come to the conclusion that the defendants' contention is well founded.

The learned counsel for the plaintiffs contended that the plaintiffs are assignees in writing of the copyright, and that an assignee, though unregistered, may maintain in his own name such an action as this if there is an entry in the book of registry of the original proprietorship, and a valid assignment otherwise than by an entry on the register under s. 13. I am unable to accede to this contention. In the first place, the plaintiffs in this action, I should point out, are suing, not as assignees of the copyright, but expressly as the "proprietors." Their title to sue as assignees is not suggested on the face of the claim. In the next place, I have come to the conclusion that, in order to maintain an action for an infringement of literary copyright, the name of the plaintiff either as proprietor or as assignee must appear on the face of the register. "Proprietor" is alone mentioned in s. 24; but to my mind the word is intended to include not merely an original proprietor, but all persons who have become proprietors by assignment or by some valid method other than that provided by s. 13. The assignee of an original proprietor becomes by his assignment as properly and fully a proprietor as his assignor was. Why

(1) L. R. 2 Q. B. 340, at p. 351.

1897

LIVERPOOL GENERAL BROKERS' ASSOCIATION v. COMMERCIAL PRESS TELEGRAM BUREAUX.

Kennedy J.

should "proprietor" in the 24th section be limited to original proprietors, and not include those who have in every sense become proprietors by assignment?

It appears to me that the intention of the Act was that the person who, being the proprietor, wishes to sue for an infringement of his copyright, should be registered before he can sue. The registration of an original proprietor, and, if he assigns, of his assignee, is provided for under s. 13 by entry on the book of registry; but if the assignment happens not to have been registered in this manner, then it seems to me that, in order to sue for an infringement of the copyright the assignee must register himself as proprietor before suing in order to comply with s. 24. I think that the law is correctly stated by Mr. Scrutton in the 3rd edition of his work on the Law of Copyright, at p. 146, where he says: "To allow the assignee to sue he must be registered. He can be registered either simply as proprietor, in which case his predecessors need not be registered, and the assignment itself need not be registered; or he can be registered as assignee, in which case the registration is the assignment, the original proprietor, who must himself be registered, entering the assignment and the name and place of abode of the assignee in the register."

In arguing for the opposite view the learned counsel for the plaintiffs relied upon an opinion expressed by Cockburn C.J. in *Wood* v. *Boosey*. (1) That case was decided by the Lord Chief Justice, and by the rest of the Court, on other and different grounds; but, of course, the opinion of the Chief Justice is entitled to great weight. What he says is: "I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that s. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned." The Chief Justice states (2) his reasons, the principal of which appears to be the chance of an injustice to the assignee, he having, in the words of the judgment, "no power under the statute, either through the

(1) L. R. 2 Q. B. 340, at p. 351. (2) L. R. 2 Q. B. at p. 352.

means of this Court or any other means that I can see, to enforce the registration of an entry by way of assignment under s. 13." With due deference, as the assignee, if the entry of the assignment is not made under s. 13, can, so far as I understand the Act, always enter himself on the book of registry as proprietor, I am unable to perceive the reality of the suggested danger of injustice to the assignee. The other members of the Court decided not to express any opinion on the point. Blackburn J. says that he had at first thought the objection fatal to the plaintiff's case, "but after hearing the argument my opinion is much shaken, and I would not support the non-suit on that ground without further time for consideration." Mellor J. and Lush J. also preferred to express no opinion on the point.

In the later case of *Tuck* v. *Canton* (1), which was not, I think, referred to in the argument before me, a similar point was raised under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68). There again the point was not decided, and the learned judge expressed considerable doubt as to how it should be decided. Mathew J. said (2): "I do not think it necessary to deal with the other questions that have been suggested, whether or not there is a necessity for registering any assignment, assuming that there was a registration of the original copyright. That is a difficult question, and one which I should take further time to consider if I thought it necessary to decide it for the purposes of this case." It seems to me that I am now called upon, to the best of my judgment, to decide the point, and although of course it is not without considerable hesitation in view of much judicial doubt, and of the opinion of the late Chief Justice, I have come to the conclusion which I have already stated, namely, that the assignee of a copyright must be registered before he can maintain an action for its infringement. [The learned judge then proceeded to consider other questions in the case, which are not material to this report, and continued:—]

In the result, then, I find myself reluctantly compelled to dismiss the action. I do so with regret, since upon the main

(1) (1882) 51 L. J. (Q.B.) 363. (2) 51 L. J. (Q.B.) at p. 365.

1897

LIVERPOOL GENERAL BROKERS' ASSOCIATION v. COMMERCIAL PRESS TELEGRAM BUREAUX.

point in the claim it is dismissed on the technical ground that the plaintiffs have not complied with the requirements of the Act of Parliament as to registration. Had it not been for this, there has been undoubtedly such an infringement of the plaintiffs' copyright as would have entitled them to succeed; and I therefore dismiss the action without costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Batesons, Warr & Wimshurst, Liverpool.*

Solicitor for defendants: *W. Haigh, Liverpool.*

A. P. P. K.

1897

April 6.

CONROY *v.* PEACOCK.

County Court—Practice—"Statutory Defence"—Notice of Injury—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 4—*County Court Rules,* 1889, *Order x., rr.* 10, 18.

In an action under the Employers' Liability Act, 1880, the defendant cannot rely upon the defence that the notice of injury required by s. 4 of the Act has not been given, unless he has given notice that he intends to rely upon it as a "statutory defence" pursuant to Order x., rr. 10 and 18, of the County Court Rules.

APPEAL from the Wandsworth County Court.

The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), to recover damages for personal injuries. A notice had been given by the plaintiff that injury had been sustained, which stated the date of the accident as being within six weeks of the time when the notice was given. At the trial the plaintiff admitted that the date of the accident was more than six weeks before the notice was given. The defendant thereupon asked that the action should be dismissed, because notice had not been given in accordance with s. 4 of the Employers' Liability Act, 1880. (1) The deputy county

(1) The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4: "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks . . . . from the occurrence of the accident causing the injury."

court judge held that this was a statutory defence, of which previous notice must be given, within Order x., rr. 10, 18, of the County Court Rules, 1889. (1) The defendant did not ask for an adjournment in order to enable him to give such notice. There was a verdict and judgment for the plaintiff.

The defendant appealed.

S. Lynch, for the appellant. The learned county court judge ought to have dismissed the action as soon as it was proved that notice of the injury had not been given within six weeks. The notice is a condition precedent to any right of action under the Act, and the want of notice is not a statutory defence given to the defendant.

Watson Moyses, for the respondent, was not heard.

CAVE J. I think this is a clear case. The County Court Rules provide, by Order x., rr. 10 and 18, that where a defendant relies upon a "statutory defence," he must give notice of such defence five clear days before the return day. In this case the defendant sought to rely on the defence that, although there was a good cause of action, notice of injury had not been given by the plaintiff within six weeks of the occurrence of the accident, as required by s. 4 of the Employers' Liability Act, 1880. That is clearly a "statutory defence" because, but for the statute, no notice of injury would be necessary. That defence, therefore, ought to have been pleaded as required by Order x., rr. 10, 18. Rule 10 provides that when notice has

(1) The County Court Rules, 1889, Order x., r. 10: "Where the defendant intends to rely upon any of the grounds of defence mentioned in rules 18 . . . . he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return day: . . . provided that in case of non-compliance with this and the above-mentioned rules, and of the plaintiff's not consenting at the trial to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the trial of the action to enable the defendant to give such notice."

Rule 18: "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter upon which he relies."

1897

CONROY v. PEACOCK.

Cave J.

not been given under the rule, the judge may, on terms, adjourn the trial to enable the defendant to give such notice. The defendant did not, however, ask for any adjournment, and it is now too late for him to do so. I am of opinion that the decision of the learned county court judge was right, and that the appeal must be dismissed.

LAWRANCE J. I concur.

Appeal dismissed.

Solicitor for defendant: *S. Franklin.*
Solicitor for plaintiff: *C. F. Appleton.*

W. A.

1897
March 1, 2, 4, 6, 8, 30.

In re GALLARD.
Ex parte GALLARD.

Bankruptcy—Sale by Trustee to Partner of Member of Committee of Inspection—Sale at an Undervalue—Damages—Delay—The Bankruptcy Rules, 1886, *r.* 316.

The sale of a bankrupt's property by the trustee in bankruptcy to a partner of a member of the committee of inspection, such partner buying for himself and not for the benefit of the partnership, does not fall within the mischief of rule 316 of the Bankruptcy Rules, 1886, which enacts that "neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, ... either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate"; neither does the principle of *Ex parte Moore*, (1881) 51 L. J. (Ch.) 72, apply.

In 1889 a trustee, with the approval of his committee of inspection, sold part of a bankrupt's estate to S. The sale was at an undervalue to the knowledge of all parties concerned. A creditor of the bankrupt became aware of the transaction in March, 1891, but took no steps to impugn it until February, 1897:—

Held, that the creditor's right to relief against S. was not barred by laches and acquiescence.

THIS was an application by Harriet Gallard, a daughter and a creditor of George Gallard, the bankrupt, to set aside a sale of part of the bankrupt's property made by the trustee in bankruptcy, under these circumstances.

In October, 1887, George Gallard, who was a builder and

contractor, was adjudicated a bankrupt, and James Harris became the trustee in bankruptcy with a committee of inspection, one of whom was a Mr. Hilliard, a member of the firm of Newman, Stretton & Hilliard, solicitors.

At the time of his bankruptcy George Gallard was largely engaged in building transactions; and, amongst other things, he was interested with a Mr. Vaughan, a Mr. Williams, and one Joseph Stretton in developing a freehold building estate near Brighton called the Aldrington estate. At this time the Aldrington estate was subject to a mortgage in fee of 20,000*l.*, which was vested in a firm of Stretton Brothers, and the four co-adventurers were entitled to the equity of redemption in equal undivided fourth shares. Joseph Stretton was a solicitor and a member of the firm of Newman, Stretton & Hilliard, but he was not a member of the firm of Stretton Brothers.

Early in 1888 James Harris, as the trustee in bankruptcy, instructed Mr. Jenkinson, an auctioneer and valuer, to report upon the bankrupt's interest in the Aldrington estate and the value thereof. Mr. Jenkinson made a written report, in which he valued the bankrupt's equity of redemption in the estate at 1750*l.*, and at the same time he pointed out the difficulty of realizing it advantageously under the existing circumstances.

In November, 1888, Joseph Stretton, who had in the meantime acquired the shares of Mr. Vaughan and Mr. Williams in the Aldrington estate, wrote to James Harris and offered 10*l.* for the bankrupt's share in the same property. This offer was declined.

In November, 1888, Miss Gallard wrote to James Harris and offered 200*l.* for the bankrupt's share in the same property. Thereupon Mr. Harris, by the direction of the committee of inspection, again consulted Mr. Jenkinson, who adhered to his previous valuation of 1750*l.* In January, 1889, Joseph Stretton again wrote to James Harris, and offered 225*l.* for the bankrupt's share in the same property.

On February 25, 1889, a meeting of the committee of inspection was held, Mr. Harris being present and Mr. Hilliard being in the chair, when it was resolved to accept Joseph Stretton's offer and to decline Miss Gallard's offer, but no entry was made

1897

In re GALLARD. *Ex parte* GALLARD.

in the minute-book of the committee of inspection disapproving of Mr. Jenkinson's valuation. On February 27, 1889, Mr. Harris wrote Joseph Stretton accepting his offer of 225*l.*, and the same day he wrote to Miss Gallard and refused her offer. On March 1, 1889, Miss Gallard wrote again offering to negotiate for the purchase of the bankrupt's estate, but her letter remained unanswered until the August following. In the meantime, in July, 1889, deeds were executed carrying out the sale to Joseph Stretton, but the purchase-money was not paid until the following October.

In June, 1889, the bankrupt died. In November, 1889, Joseph Stretton died, and James Harris and two other persons were the executors and trustees of his will. It then transpired that Joseph Stretton had acquired the mortgage of 20,000*l.* on the Aldrington estate in 1886, and that the firm of Stretton Brothers, to whom it had been transferred, merely held it in trust for him.

Mr. Hilliard died in 1891.

In March, 1891, James Harris supplied Miss Gallard, at her request, with a copy of his cash account as trustee in bankruptcy, which disclosed to her for the first time the sale of the bankrupt's equity of redemption in the Aldrington estate to Joseph Stretton for 225*l.* But Jenkinson's valuation and the other facts above stated did not come to her knowledge until towards the close of 1896.

In February, 1897, Miss Gallard launched the present motion against the trustee in bankruptcy and the executors and trustees of the will of Joseph Stretton, claiming to have the said sale set aside on the ground (1.) that it was contrary to the provisions of rule 316 of the Bankruptcy Rules, 1886, the leave of the Court not having been obtained; and (2.) that it was at a gross undervalue. She also claimed a declaration that the respondents were jointly and severally liable to make good the loss sustained by such sale, and if necessary, an inquiry as to damages.

Miss Gallard in her affidavit in support of the motion stated that she was willing to give 300*l.* for the property sold to Joseph Stretton. It further appeared from the evidence that since

1889 portions of the Aldrington estate had been sold, and there had been dealings with other parts thereof which made it impossible to restore matters to the position in which they were in 1889.

E. C. Willis, Q.C., and *Mackintosh*, for the motion. This sale, if not strictly within the terms, is within the spirit of rule 316 of the Bankruptcy Rules, 1886, which simply affirmed the old principle in bankruptcy that neither a partner nor a servant of the trustee or of any member of the committee of inspection shall buy the estate: *Ex parte Moore*. (1) The onus is on the respondents to give a full and clear explanation. The facts shew that the parties were all working together to hand over the property to Joseph Stretton irrespective of value. Hilliard was a member of the committee of inspection, and was in a fiduciary position, and Stretton must have known that the sale to him was at a gross undervalue to the knowledge of the trustee and Hilliard. Sect. 8 of the Trustee Act, 1888, does not apply to a trustee in bankruptcy: *In re Cornish*. (2) Miss Gallard has made her application within six years, and is not barred by acquiescence or laches.

H. Reed, Q.C., and *Muir Mackenzie*, for Harris. This transaction is not within the terms of rule 316, which must be construed strictly. The mischief pointed at by the rule is that a trustee or member of the committee of inspection shall not obtain a profit through his partner or agent. Here Stretton bought entirely on his own account, and not on behalf of his firm. Further, the Court has a discretion in the matter, and this is not a sale which the Court in the exercise of its discretion will set aside. If the leave of the Court had been applied for at the time it would in all probability have been obtained. If it had been refused Stretton would have foreclosed. The trustee was in a most difficult position. The equity of redemption was heavily mortgaged and unsaleable in the market, and there were only two possible buyers—Stretton and Miss Gallard. Under the circumstances he did the best he could, and accepted the better offer, and the evidence fails to establish a sale at an

(1) 51 L. J. (Ch.) 72; 45 L. T. 558. (2) [1896] 1 Q. B. 99.

1897

In re GALLARD. *Ex parte* GALLARD.

undervalue. Lastly, there has been unconscionable delay in coming to the Court. It is impossible now to replace the parties in the position they were in in 1889, and there is no evidence of damage before the Court.

Ashton Cross, for the representatives of Joseph Stretton. There has been such acquiescence and lapse of time as to bar relief against Stretton, the purchaser, who died in 1889. He was a stranger to the bankruptcy and held in no sense a fiduciary position, and there is no evidence of fraud, or collusion, or conspiracy on his part. Since 1891 Miss Gallard has stood by, and it is inequitable after the lapse of time that her application should be granted: *Soar* v. *Ashwell*. (1)

E. C. Willis, Q.C., in reply, cited *Metropolitan Bank* v. *Heiron*. (2)

VAUGHAN WILLIAMS J. The first point which I have to decide is whether the sale by the trustee to Stretton was contrary to the provisions of rule 316 of the Bankruptcy Rules, 1886. In my judgment, it was not. The rule runs thus: "Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly by himself or any partner, clerk, agent, or servant become the purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor." I am of opinion upon the evidence before me that Mr. Hilliard, the partner of Mr. Stretton in the firm of Newman, Stretton & Hilliard, who was the purchaser, had no interest, directly or indirectly, in the purchase of the property. It seems to me to have been a purchase by Mr. Stretton on his own account, and I do not think that the partnership firm had, as between themselves and Mr. Stretton, any interest in this purchase. I think that the purchase was a purchase by Mr. Stretton on his own account, and not in any way for the benefit of the firm. In my judgment such purchase does not fall within the words of rule 316. The ground upon which it

(1) [1893] 2 Q. B. 390. (2) (1880) 5 Ex. D. 319.

1897

In re GALLARD. *Ex parte* GALLARD.

Vaughan Williams J.

is suggested that the sale comes within the rule is that Mr. Hilliard, a member of the committee of inspection, was at the time of the sale a partner of Mr. Stretton, the purchaser. I think that the rule only covers cases where the purchase is directly or indirectly a purchase by a trustee, or a member of the committee of inspection. The words of the rule, according to their natural meaning, seem clearly only to include cases of purchases directly or indirectly by the trustee or member of the committee of inspection. It is urged against this that so to construe the rule would be inconsistent with the established rule in bankruptcy that there cannot be a sale to a partner of a trustee. This seems to have been the rule at one time, at all events: see *Ex parte Moore* (1); but I do not think that this entitles me to amplify a rule of which the words are clear. Secondly, it is urged that the words of the rule are not clear. It is said that the words "by his partner, clerk, agent, or servant," are unnecessary, if they are only instances of indirect purchases, and that the meaning is that a purchase by a partner, clerk, agent, or servant, or by a person standing in such relation to a trustee or member of a committee of inspection, should be deemed to be an indirect purchase by the trustee, even though there is no proof that the purchase was in any way for his benefit. I cannot come to this conclusion, even though the rule so construed might be, as I think it would be, a salutary rule, and in accordance with previous bankruptcy practice. I hold, therefore, that the sale does not come within the rule. But the case was also argued on the basis that the sale was a fraudulent sale at an undervalue. Now, I have come, with great regret, to the conclusion that this charge is made out. [The learned judge then dealt with the evidence on this point at length, and held that the sale was made at an undervalue to the knowledge of all parties concerned, and continued:—]

The only matter that remains to be dealt with is the Statute of Limitations, or rather the equitable analogy to the Statute of Limitations. It is not suggested here that the statute itself applies; but it is said that the case is one of those in which equity follows the law, and will not allow the action after a

(1) 51 L. J. (Ch.) 72; 45 L. T. 558.

1897

In re GALLARD. *Ex parte* GALLARD.

Vaughan Williams J.

lapse of these years to succeed. Now it is admitted that in so far as express trustees are concerned the statute would afford no answer—that is, it is not really argued that the lapse of time affords any defence to Mr. Harris, who is one of the respondents in his capacity as trustee in bankruptcy; but it is said that Mr. Stretton was not a trustee, was not in a fiduciary capacity, and that the utmost that can be said in relation to him is that he was a constructive trustee, and that in the case of a constructive trustee the analogy of the Statute of Limitations can be successfully set up. But when I refer to the case of *Soar* v. *Ashwell* (1) I find Lord Esher in his judgment says (2): "The cases seem to me to decide that where a person has assumed, either with or without consent, to act as a trustee"—then he goes on to say that such a person will be treated as if he were an actual trustee, and continues: "There is another recognised state of circumstances in which a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property. Such a person will be treated by a court of equity as if he were an express trustee of an express trust." Lord Esher, when he makes that observation, was dealing expressly with the point when in equity the lapse of time can be set up in answer to a claim for breach of trust; and both Bowen and Kay L.JJ. arrived at the same conclusion, and in every way confirmed that observation of Lord Esher. I am of opinion, therefore, that under the circumstances the lapse of time affords no answer to the claim that is made here. No doubt in equity the Courts are accustomed not to lay down any hard and fast rule, but in each case, where it is sought to answer a claim by the lapse of time, to take into consideration the whole of the circumstances and say whether, having regard to those circumstances, the balance of justice is in favour of allowing lapse of time to be set up as an answer, or whether it is not. But in the present case I have arrived at the conclusion that the balance of justice is against allowing the lapse of time to be set up. I know that Miss Gallard has been engaged in years

(1) [1893] 2 Q. B. 390. (2) [1893] 2 Q. B. at p. 394.

of litigation with the trustee and others connected with this bankruptcy; but I am of opinion that there is nothing to shew that she, until quite recently, was aware of the valuation, or at all events of the contents of the valuation, by Mr. Jenkinson. I know also that it is said that Miss Gallard ought to have made further inquiries than she did, having the information which she had got. She plainly knew of the sale to Stretton as early as March, 1891, and I daresay that if she had traced the matter out she would have arrived at Mr. Jenkinson's valuation, and possibly would have arrived at other information pointing to a sale at an undervalue. But still, notwithstanding this, in my judgment the balance of justice is in favour of not allowing the lapse of time to be set up here as a defence. I should like to quote from the judgment in *Rochefoucauld* v. *Boustead* (1) the portion of the judgment of Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (2), which is there cited by Lindley L.J. It is this (3): "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty, but that I think is inherent in the nature of the inquiry." I have tried to apply that rule to this case. I have tried to put on one side and the other the due weight that ought to be given to such facts as those which I have just been speaking of. Having done so, I have come to the conclusion that I ought not to allow the lapse of time here to bar the remedy, and that under the circumstances this application ought to be granted. But I do not feel disposed to order the sale to be set aside, having regard to the lapse of time and the changes of interest and negotiations that have been going on, but to give damages instead of setting

(1) [1897] 1 Ch. 196. (2) (1878) 3 App. Cas. 1218, at p. 1279.
(3) [1897] 1 Ch. at p. 211.

1897

In re GALLARD. *Ex parte* GALLARD.

aside the sale. I think the proper course will be to direct the usual inquiry of what damage, if any, the estate has sustained by reason of this sale.

Solicitors for applicant: *Sawyer & Ellis, for J. C. Buckwell, Brighton.*

Solicitors for respondents: *Ashurst, Morris & Co.; Turner, Rogers & Myers.*

H. L. F.

1897
May 11.

In re EATON & CO.
Ex parte VINEY.

Bankruptcy—Fraudulent Preference—Payment of overdue Acceptance—Onus of Proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

When a bill of exchange is not presented for payment at maturity but is held over at the request of the acceptor and subsequently paid, such a payment is not within the principle of *In re Clay & Sons*, (1895) 3 Manson, 31, and may be a fraudulent preference within s. 48 of the Bankruptcy Act, 1883.

When a trustee in bankruptcy proves that the debtor was insolvent at the time when he made the payment that is impeached as a fraudulent preference, the onus of proof shifts, and the party supporting the payment must shew that it was not made with the view of preferring him.

THIS was an application that raised the question whether the payment by the debtors of an overdue acceptance was a fraudulent preference.

On April 27, 1896, A. and P. Eaton, trading as "Eaton & Co.," gave F. Wigley, their brother-in-law, an acceptance dated April 23, 1896, for 700*l.* payable six months after date. The consideration for this acceptance was the sum of 700*l.* advanced by F. Wigley to them in July, 1895.

In October, 1896, shortly before the bill fell due, F. Wigley consented, at the debtors' request, to hold over the bill for a few days. At the same time the debtors made a written application to him to lend them the further sum of 2000*l.*, which, after consideration, he declined to do. On November 12, on an intimation from the debtors, he sent the bill forward through his bankers in the usual way, and it was paid.

1897

In re EATON & Co. *Ex parte* VINEY.

On November 26 acceptances of the debtors for goods supplied by trade creditors fell due to the amount of 1180*l.*, and were dishonoured. On December 5 a receiving order was made against the bankrupts on their own petition, adjudication followed, and J. Viney became the trustee in bankruptcy.

The trustee now claimed a declaration that the payment of the 700*l.* by the bankrupts to F. Wigley on November 16, 1896, was a fraudulent preference under s. 48 of the Bankruptcy Act, 1883; and an order that F. Wigley might be ordered to repay the said sum of 700*l.* forthwith.

It appeared from the evidence that the bankrupts were insolvent when they gave the bill in April, 1896, and also when they paid it; that they had not funds at their bank to meet it when it fell due; and that in November, 1896, they sold stock-in-trade at a considerable loss, and applied the proceeds of such sale to pay F. Wigley's acceptance, and also two acceptances of another relative. It was not disputed that F. Wigley acted in good faith and had no knowledge of the insolvency.

H. Reed, Q.C., and *Muir Mackenzie*, for the trustee, stated the facts.

[VAUGHAN WILLIAMS J. The fact that the debtors were insolvent when they made the payment, and knew that they were insolvent, causes the onus of proof to shift, and it is for the respondent to shew that the payment was not made with a view to prefer him.]

E. C. Willis, Q.C., and *Ball*, for F. Wigley. There is no evidence of intention to prefer. Bills of exchange stand on a peculiar footing, and the distinction between the payment of a bill of exchange and other payments is pointed out in *In re Cheesebrough*. (1) This was an honest bill, given and paid in the ordinary course of business, and is not a fraudulent preference, although the debtors were insolvent at the time it was paid: *In re Clay & Sons*. (2) The inference is that the dominant view of the debtors was to get a further advance of 2000*l.* to enable them to carry on business, and the bill was paid with that object.

(1) (1871) L. R. 12 Eq. 358. (2) 3 Manson, 31.

1897

In re EATON & Co. *Ex parte* VINEY.

Reed, Q.C., in reply. This was not an ordinary business transaction. *In re Clay & Sons* (1) is distinguishable. The bill was not presented at maturity. It was therefore not the payment of a bill as it fell due in the ordinary course of business. It was really a voluntary payment.

VAUGHAN WILLIAMS J. In this case I have to decide what was the dominant view with which these debtors made the payment. There is no question but that they were insolvent in October and when the payment was made in November. It seems to me also that they were insolvent when the acceptance was given; but I draw no inference against them by reason of that insolvency, because, although the trustee has suggested that the bills were really given to the cash creditors in April and May for the purpose of the fraudulent preferences, and that the length of time (six months) the bills had to run could only be accounted for by imputing to the debtors the intention of raising money meanwhile to pay off the amounts of the acceptances, no such suggestion was put to Mr. Wigley in cross-examination, and therefore I do not think I ought to impute it. Then it was contended by Mr. Cooper Willis that this was a payment made in the ordinary course of business, and he called my attention to the case of *In re Clay & Sons.* (1) But in my judgment this case cannot be brought within the principle of *In re Clay & Sons.* (1) I say again, as I said then, that the mere fact a man in business, when insolvent, meets a bill of exchange raises no inference of an intention or view to prefer the holder of the bill, because in the ordinary course of business a man must either meet his bills or put up his shutters. But the reason why *In re Clay & Sons* (1) does not apply here is because the acceptance was not paid in due course. It was not presented at maturity, but afterwards and by express request. The result is, that this was a voluntary payment, and not a payment in ordinary course. Being a voluntary payment, I have to see with what view it was made. The suggestion put forward is that it was made, not with the view of preferring this creditor, but to get him in a good humour in

(1) 3 Manson, 31.

1897

In re EATON & Co. *Ex parte* VINEY.

Vaughan Williams J.

order that he might assent to the application for the loan of 2000*l*. I must take it that there was an application for such a loan, and that it was pending at the time when this payment was made. That being so, the question is whether I can draw the inference that that was the view with which the payment was made. I should have been very glad to be able to draw that inference if I could, but I am afraid I cannot. It is a hard case. But when I look at the bank-book and see the way in which these debtors dealt with the cash raised by discounting acceptances for goods sold and the way in which the funds so obtained were applied to pay their overdue acceptances, I am afraid that the only inference I am justified in drawing is that the intention of the debtors was to prefer these cash creditors, and I so hold with regret. There will be no order as to costs.

Solicitors: *Phelps, Sidgwick & Biddle; E. M. Wood.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

1897

May 13.

THE TRUSTEE OF THE PROPERTY OF NEW, PRANCE & GARRARD *v.* HUNTING AND OTHERS.

Bankruptcy—Conveyance to make good Breaches of Trust—Revocable Mandate—Fraudulent Preference—Evidence—Notes of Bankrupt's Examination—Deposit of Share Certificates—Declaration of Trust.

A bankrupt, two days before his bankruptcy, executed a deed, by which he conveyed an estate to a person upon trust to raise thereout by sale or mortgage 4200*l*., and therewith to make good divers breaches of trust which he had committed in respect of certain scheduled trust estates of which he was trustee. By the deed he charged the property conveyed with the payment of the 4200*l*., and conferred on the grantee, his executors or administrators, a power to appoint new trustees. The deed was not communicated to any of the beneficiaries:—

Held, that the deed was not a revocable mandate, but created the relation of trustee and cestui que trust as between the grantee and the persons interested in the trust estates and was consequently irrevocable:

Held, also, that the deed was not a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883, because the object of the bankrupt in executing it was not to prefer some creditors to others, but

C. A.
1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

to shield himself from the consequences of the breaches of trust committed by him:

Held, also, that answers made by the bankrupt on his public examination ought not to be given effect to as evidence to invalidate the deed against the beneficiaries.

The bankrupt shortly before his bankruptcy deposited certificates of shares in a box with memoranda to the effect that they were deposited as securities for the moneys due to the several trust estates. The certificates remained in his custody and control, and the transaction had not been communicated to the beneficiaries:—

Held, that the transaction constituted a good declaration of trust in respect of the shares in favour of the trust estates.

Middleton v. *Pollock*, (1876) 2 Ch. D. 104, approved of.

APPEAL from the judgment of Vaughan Williams J. at the trial before him without a jury.

The action was for a declaration that a deed of conveyance executed by Prance on March 29, 1894, was void as against the plaintiff, as the trustee of his estate in bankruptcy, and also for a declaration that certain deposits of certificates of shares in a company made by Prance by way of security as after mentioned were void and conveyed no title as against the plaintiff.

The facts as to the deed, which are fully stated in the report of the case in the Court below (1), were more briefly as follows. Messrs. New, Prance & Garrard were a firm of solicitors. In November, 1893, New, the senior partner, died insolvent, and the business of the firm was carried on by Prance and Garrard until March 31, 1894, when a receiving order was made against them on their own petition, and they were subsequently adjudicated bankrupts. Their trustee in bankruptcy also became, under an administration in bankruptcy pursuant to s. 125 of the Bankruptcy Act, 1883, and s. 21 of the Bankruptcy Act, 1890, trustee of the estate of New, deceased. The firm had been to their own knowledge insolvent for some years.

On March 29, 1894, Prance executed a deed by which he conveyed an estate, of which he was owner in fee, to the defendant Hunting upon trust to raise thereout by sale or mortgage a sum of 4200*l.*, and therewith to make good certain breaches of trust which he had committed in respect of certain trust estates mentioned in a schedule to the deed of which he was trustee.

(1) [1897] 1 Q. B. 607.

By the same deed he charged the estate with the payment of the said sum of 4200*l.* thereby directed to be raised: provided that, if the moneys ultimately required for the rectification of and completely satisfying the said breaches of trust should be less than the said sum of 4200*l.*, then that the difference or surplus should be held in trust for and should be paid over to Prance; and further, that, if, when the whole of the payments intended to be thereby secured should have been made and perfected, any parts of the hereditaments thereby conveyed should remain in Hunting unsold, he should forthwith, upon completion of the trusts, reconvey such unsold hereditaments to Prance. The deed also conferred upon Hunting, his executors and administrators, a power to appoint new trustees for the purpose of carrying into effect the trusts of the deed.

The deed recited as follows: "And whereas the said C. C. Prance is a trustee in the trust estates mentioned in the schedule hereunder written and on the happening from time to time of the payment off of the securities on which the moneys of such trust estates have been invested he has allowed such moneys to be paid into the general banking account of the said firm of New, Prance and Garrard pending their intended reinvestment on other mortgage securities with the result that in some instances there are at present no securities at all appropriated for the same and in other instances although the trust funds are invested on securities yet by reason of the agricultural depression and the depreciation of land since the investments were made or from death of the mortgagor or from other causes it is estimated that such securities are deficient in value and will not produce the amounts nominally secured thereby And whereas it is apprehended that such dealing with the said trust funds has been a breach of trust or breaches of trust for which the said C. C. Prance is personally responsible to the several cestui que trustent And whereas the said C. C. Prance to rectify such breaches of trust as far as may be and thereby to shield and exonerate himself as far as possible from liability to the proceedings he is now or may at any time hereinafter be exposed to by reason of such breaches of trust is desirous of executing

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

these presents Now this Indenture witnesseth that in pursuance of such desire and in order to effectuate the same and for the special reason and consideration hereinbefore recited he the said C. C. Prance as beneficial owner doth hereby convey" &c. The fact that this deed had been executed was not communicated to any of the co-trustees of Prance, or to any of the beneficiaries, or to any of his creditors. The defendant, Hunting, was at the date of the deed the principal clerk in the accountant's department of the firm.

In January, 1896, the plaintiff commenced the action against Hunting, Prance, and other defendants interested under the deed as stated in the report of the case in the Court below (1), seeking to have the deed declared void as against the plaintiff, on the ground that the deed and the trusts thereof were revocable, and were in fact revoked by the bankruptcy of Prance; and in the alternative, on the ground that the deed was a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883.

With regard to the deposits of share certificates before mentioned, it appeared that in February, 1894, Prance instructed a clerk in the employ of the firm to place in boxes respectively containing the respective securities and papers of the trust estates of which he was trustee certificates of shares in a limited company belonging to the firm, with in each case a memorandum of deposit, signed by Prance and the firm, by which it was declared that the certificates of shares bearing certain numbers were thereby deposited as further and additional security for the moneys due to the trust estate. These certificates and memoranda, together with all the securities and papers connected with the trust estates of which Prance was trustee, were afterwards placed in one box labelled "Prance's Trusts." The certificates of the shares and the memoranda remained at the date of the bankruptcy in the custody and control of Prance, and the deposit of the certificates did not in any case appear to have been communicated to the persons interested in the trust estates. The plaintiff by his statement of claim claimed the shares as part of the estate of the bankrupts on

(1) [1897] 1 Q. B. at p. 610.

the ground that what had taken place with regard to them was not effectual to vest any title to them in Prance as trustee for the trust estates, and that the deposits were void as fraudulent transfers or assignments under sub-s. 1 (*b*) of s. 4, and s. 47 of the Bankruptcy Act, 1883, or as being by way of fraudulent preference under s. 48 of the Act.

The plaintiff's counsel admitted in the Court below that the facts with regard to these deposits were substantially identical with those of the case of *Middleton* v. *Pollock* (1), and that in that court the case was concluded by that decision.

At the trial the plaintiff's counsel proposed to read the shorthand notes of Prance's public examination in the bankruptcy proceedings as being evidence against him; but the learned judge refused to allow them to be read, on the ground that he was defending the action in a representative capacity as trustee, and his answers were not evidence against his beneficiaries. (2)

The learned judge gave judgment for the defendants both as to the deed and the share certificates.

Muir Mackenzie and *R. Harington*, for the plaintiff. The first question is whether the deed was revocable, for, if it was, it was revoked by the bankruptcy of Prance. The principle deducible from the authorities is that, where a debtor makes a conveyance of property upon trust for distribution among creditors, to which the creditors are not parties, until the fact of the execution of the deed is communicated to a creditor or the deed is acted upon, it is a mere revocable mandate, and the trustee is merely the agent of the grantor, and not a trustee for the creditors: *Garrard* v. *Lord Lauderdale* (3); *Acton* v. *Woodgate* (4); *Johns* v. *James* (5); *In re Ashby* (6); *Gibbs* v. *Glamis* (7); *Synnot* v. *Simpson*. (8) This case falls within that principle.

[They also cited on this point *Smith* v. *Hurst*. (9)]

Secondly, the deed is void as being a fraudulent preference

(1) 2 Ch. D. 104.
(2) [1897] 1 Q. B. at p. 611.
(3) (1830) 3 Sim. 1.
(4) (1833) 2 My. & K. 492.
(5) (1878) 8 Ch. D. 744.
(6) [1892] 1 Q. B. 872.
(7) (1841) 11 Sim. 584.
(8) (1854) 5 H. L. C. 121.
(9) (1852) 10 Hare, 30.

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

within s. 48 of the Bankruptcy Act, 1883. The persons interested in the trust estates in the cases where a breach of trust had been committed were "creditors" within the meaning of that section, for they could prove in the bankruptcy under s. 37, sub-s. 3: *Ex parte Kelly* (1); *In re Paine, Ex parte Read.* (2) The deed was executed with the view of giving them a preference over the other creditors. The necessary consequence of the deed was such a preference, and the grantor must be taken to have intended the necessary consequence of his own act. Assuming that his motive was the desire to protect himself from the penal consequences of the breaches of trust which he had committed, nevertheless, if, in order to do that, he intended to prefer certain creditors over others, the deed falls within the section as being made with a view to prefer those creditors. *Ex parte Taylor* (3) is distinguishable, for in that case there was actual pressure and a threat of proceedings.

[They also cited on this point *Ex parte Ball.* (4)]

Thirdly, it is submitted that the learned judge had no discretion to refuse to admit the answers given by Prance upon his examination in the bankruptcy. Sect. 17, sub-s. 8, of the Bankruptcy Act, 1883, makes such answers evidence against him. It is submitted that this Court should allow them to be read now for the purpose of shewing what Prance's view was in executing the deed.

Fourthly, with regard to the deposits of share certificates, it is contended that what took place did not amount to a good declaration of trust or pass any interest in the shares. The shares remained in Prance's control, and the transaction was never communicated to the beneficiaries. There was no bonâ fide intention to pass the interest in the shares. In *Middleton* v. *Pollock* (5) it was held that a transaction substantially identical with that which took place in the present case constituted a good declaration of trust, and was not void as not being bonâ fide within 13 Eliz. c. 5. That decision is in direct conflict with the previous decision in *Wilson* v. *Balfour.* (6) It is

(1) (1879) 11 Ch. D. 306.
(2) [1897] 1 Q. B. 122.
(3) (1886) 18 Q. B. D. 295.
(4) (1887) 35 W. R. 264.
(5) 2 Ch. D. 104.
(6) (1811) 2 Camp. 579.

contended that the case was wrongly decided, and it is not binding on this Court.

[A. L. SMITH L.J. In *Wilson* v. *Balfour* (1) the memorandum stated that the bonds had been deposited with the defendant, which was not the case, and the ground of the decision was that the whole thing rested in intention.]

Upjohn, *Clayton*, and *P. Van Neck*, for the defendants, were not called upon.

LORD ESHER M.R. The first question is whether the deed executed by Prance was or was not revocable. In deciding that question great assistance is derivable from what was said by Turner V.-C. in *Smith* v. *Hurst*. (2) He there said: "Many of the cases upon voluntary deeds were cited and commented upon in the argument of this case: and I have thought it right, therefore, to examine the authorities upon the subject. They appear to me to result in this, that, in cases of deeds vesting property in trustees for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case. It is difficult at first sight to see the distinction between the two classes of cases; for in each of the classes a trust is purported to be created, and the property is vested in trustees; but I think the distinction lies in this: in cases of trust for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and, the trust being well created, the property in equity belongs to the cestui que trusts as much as it would belong to them at law, if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court there has to examine into the circumstances, for the purpose of ascertaining

(1) 2 Camp. 579. (2) 10 Hare, 30.

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

Lord Esher M.R.

what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself. Each case of the latter description being thus governed by its circumstances, any further examination of the authorities would, I think, be useless." Now what are the circumstances of this case? The defendant Prance had committed breaches of trust with regard to some of his clients. He appears to have had various creditors, and he makes a conveyance, not in favour of his creditors generally, but in favour of particular persons only, who are sufficiently earmarked by the deed—namely, the persons with regard to whom he has committed the breaches of trust. Taking the rule to be as laid down by Turner V.-C., that of itself prevents the deed from being revocable, and makes the trustee appointed by the deed a trustee for the particular persons in whose favour the deed was executed. But there is a further reason why the deed should be considered irrevocable. The breaches of trust which Prance had committed might, when discovered, render him subject to various penal consequences. Application might be made to strike him off the rolls, or he might be liable to prosecution. What had he obviously in view when he executed this deed? It would be no answer, of course, to proceedings of a penal nature against him by the persons whom he had defrauded, but it might have a material effect on the punishment inflicted upon him. At all events, he seems to have thought that the consequences to himself might be mitigated if he were, as far as possible, to put those persons in the same position as if he had not committed the breaches of trust: and he could not do that, unless he meant to give them an absolute interest in the estate which he was conveying, and to make the person to whom he was conveying it a trustee for them. Under these circumstances it is obvious that it could not be his intention to reserve to himself any right or possibility of undoing what he was doing, and that he intended that it should be irrevocable.

That being so, the conveyance must stand, unless it is a fraudulent preference. The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shewn, not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called "intention," or "view," or "object" does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to me to shew what was really his object. It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly, and those persons had a hold upon him, because, if they chose to proceed against him, the consequences to him might be very serious. He thought that, if he put them as far as he could into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. It seems to me clear, therefore, that he made this conveyance, not with the "intention," or "view," or "object," or whatever it may be called, of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act.

Another point raised on this appeal is this: it is contended that certain answers made by Prance upon his examination in the bankruptcy proceedings were admissible as evidence. It was said that they were admissible as evidence against him; but it is obvious that the object was to use them as evidence against the other defendants. But in any case they were not admitted at the trial, and we are not asked to grant a new

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

Lord Esher M.R.

trial, but to allow them to be read in this court. I do not think we are bound to retry the case on that new footing and on new facts. If, as I think, we have a discretion in the matter, I am of opinion that we ought to decline to allow these answers to be read now; but the question is really of no importance, for whatever their purport may be, they would have no weight with me for the present purpose.

Then there is the question as to the effect of the deposit of shares. It was admitted by the plaintiff's counsel at the trial that on the facts this case came exactly within the authority of *Middleton* v. *Pollock* (1), and that therefore he could not argue that question in the court below, but must reserve it for the Court of Appeal. Therefore the only question is whether the decision in *Middleton* v. *Pollock* (1) was correct. It was urged that the decision of Jessel M.R. in that case was in conflict with that of Lord Ellenborough in *Wilson* v. *Balfour*. (2) But I do not think the point raised by that case was the same. I cannot see that the decision in *Middleton* v. *Pollock* (1) was wrong, and I am not prepared to overrule it. Upon these grounds I think the appeal fails on every point and must be dismissed.

A. L. SMITH, L.J. The first question is whether the deed executed by Prance was revocable. The circumstances under which it was executed appear upon the face of the deed itself. Prance, who was a solicitor, being a trustee of certain trust estates, had betrayed his trust and misappropriated the trust funds. At the time when he executed the deed he was insolvent, and two days later a receiving order was made against him. Whether the deed was a revocable deed may be stated briefly as follows. Was it a mere agency deed—that is, a deed by which the estate was conveyed to Hunting merely that he might act as agent for Prance in realizing and distributing the proceeds of it among those who were to benefit by it; in which case, to use the words of James L.J. in *Johns* v. *James* (3), it would be like a mandate to a servant to use money in a parti-

(1) 2 Ch. D. 104. (2) 2 Camp. 579.
(3) 8 Ch. D. 744, at p. 749.

cular way, and would be revocable; or was its effect really to make Hunting a trustee for the cestui que trusts? Looking at the circumstances I have no doubt that the object of the deed was to create a valid trust in favour of the cestui que trusts mentioned in it. The recitals in the deed appear to me clearly to shew that it was executed by Prance for the purpose of shielding and exonerating himself as far as possible from liability by creating a valid trust in favour of his cestui que trusts, not of himself. That conclusion is fortified, as pointed out by the learned judge in the Court below, by the provision in the deed for the appointment of new trustees by Hunting, his executors or administrators. There is also the further consideration that, not content with making Hunting a trustee for the purposes previously mentioned, Prance goes on to charge the sums required for satisfying the breaches of trust upon the estate. I am clearly of opinion that this deed was not a mere agency deed executed for Prance's own convenience, but created a valid trust for the cestui que trusts therein mentioned, and therefore was not revocable.

The second question is whether the deed was a fraudulent preference by Prance of particular creditors to the detriment of other creditors. I have always understood that, to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was; whether it was to defraud some creditors by preferring others, or for some other motive. I come to the conclusion in this case that the dominant motive in Prance's mind was the desire, not to prefer some creditors to others, but to save himself from prosecution or being struck off the rolls, or other penal consequences of his breaches of trust. The recitals in the deed obviously point to that being his object. It appears to me that this case is really covered by the decision in *Ex parte Taylor* (1), where the facts were identical with those of the present case with the exception that there appears to have been in that case an actual threat of proceedings, whereas in the present case, though there seems to have been no threat of proceedings, Prance knew perfectly well that his

(1) 18 Q. B. D. 295.

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

A. L. Smith L.J.

breaches of trust must be discovered almost immediately, and that proceedings would certainly be taken against him in respect of them. The pressure upon him in either case is about identical.

With regard to the question as to the deposit of shares, it is admitted that this case is covered by the decision in *Middleton* v. *Pollock* (1), and I see no reason to think that that decision was wrong.

With regard to the admissibility in evidence of the answers of Prance in the bankruptcy proceedings, the facts of the case seem to me so clear that I do not think that, if admitted, they could possibly have had any effect. For these reasons I agree that the appeal should be dismissed.

CHITTY L.J. I agree. The first point is whether the deed of conveyance was revocable at the pleasure of Prance. As a general rule, apart from any question of bankruptcy, or of a trust in favour of creditors, a deed of conveyance by which trusts are declared is binding upon the maker of it, unless he reserves to himself a power of revocation. But there is a class of cases, of which *Garrard* v. *Lord Lauderdale* (2) is typical, in which courts of equity, departing from the strict letter of the deed, have held that the true intention is merely to create an agency, and that, until the deed has been communicated to creditors or acted upon, the person in whom the estate is vested is not a trustee for the creditors, but merely an agent for the maker of the deed. As Turner V.-C. observed in *Smith* v. *Hurst* (3), it is difficult at first sight to see the distinction between the two classes of cases, for in each of the classes a trust is purported to be created, and the property is vested in the trustees.

James L.J. in *Johns* v. *James* (4) gave the reasons for the decision in *Garrard* v. *Lord Lauderdale* (2), which, he says, proceeded upon the plainest notions of common sense. He points out that in such a case it could not be the intention of the grantor that a binding trust should be created, for, if it were, he could not get a sixpence from the trustees of the deed,

(1) 2 Ch. D. 104.
(2) 3 Sim. 1.
(3) 10 Hare, 30.
(4) 8 Ch. D. 744, at p. 749.

and he and his family might be left to starve. I cannot add anything to the observations of the learned Lord Justice with regard to the reasons for that decision. But, when we look at the circumstances under which the deed now in question was executed, which is always admissible in cases of this kind, it seems clear that it was Prance's intention that it should be irrevocable. To hold that it was revocable would be, as it appears to me, to defeat the very object which he had in view. That object is shewn by the recitals, the truth of which is not disputed. He was the trustee of several trust estates. He was a solicitor, and had received moneys belonging to the trust estates which he had misappropriated. He therefore stood in peril, and bankruptcy was impending. He knew that he was not only liable to actions for breaches of trust, but that he was also liable to attachment, or perhaps to prosecution. He was aware that in a very short time the breaches of trust which he had up to that time been able to conceal must necessarily come to light. It would be a strange thing to hold that it was the intention of this man that he should be able to revoke this deed which he intended to be a shield to protect him from the consequences that were hanging over him. I agree that the power to appoint new trustees contained in the deed is a further circumstance pointing to the conclusion that it was intended to be irrevocable, as also is the charge made in favour of the trust estates. The result in my opinion is that the deed was irrevocable.

Then comes the question whether the deed was a fraudulent preference. The 48th section of the Bankruptcy Act speaks of the "view" with which the preference is made. I agree with the Master of the Rolls that there is not much to be gained by giving paraphrases for the term "view" such as "aim," "object," or "intention." I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors? The answer to that question must I think be in the negative. It was to protect himself against the charges hanging over him.

With regard to the question whether the shares were well appropriated by the deposit of the certificates accompanied by the

C. A. 1897

NEW, PRANCE & GARRARD'S TRUSTEE v. HUNTING.

Chitty L.J.

memorandum, it is admitted by the plaintiff's counsel that the case is covered by the decision in *Middleton* v. *Pollock* (1), and the only question is whether that decision was right. In that case a fund had been placed in the hands of a solicitor for investment: therefore it was his duty to make the investment, and the nature of the investment to be made was left to him. Under those circumstances it was clear that there was a valid appropriation of the property to which the memorandum in that case referred as security for the amount entrusted to the solicitor for investment. The case of *Wilson* v. *Balfour* (2) appears to me to stand on a different footing altogether. In my opinion *Middleton* v. *Pollock* (1) was well decided.

With regard to the question as to the answers made by Prance in the bankruptcy proceedings, such answers are made by s. 17 of the Bankruptcy Act evidence against him, but they ought not to be given any effect to as against the cestui que trusts. It appears to me that under the circumstances of the present case it would be of no use whatever to put in such evidence; and, as they cannot affect the question arising in this appeal, the Court are justified now in refusing to allow them to be read.

Appeal dismissed.

Solicitors for plaintiff: *Burton, Yeates & Hart, for Johnsons, Barclay & Rogers, Birmingham.*

Solicitors for defendant: *Rowcliffes & Co.; M. H. Prance; R. White.*

(1) 2 Ch. D. 104. (2) 2 Camp. 579.

E. L.

THE QUEEN *v.* PELLY AND ANOTHER.

1897
March 31.

Licensing Acts—Offences—Being found Drunk on Licensed Premises after Closing Hours—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.

A customer, not being an inmate or lodger, who is found drunk in a public-house after the closing hour and after the premises are in fact closed, may be convicted under s. 12 of the Licensing Act, 1872, of being found drunk on licensed premises. Licensed premises do not cease to be licensed premises for the purposes of that section by reason of the fact that after the hour of closing they are no longer open to the public.

Lester v. *Torrens*, (1877) 2 Q. B. D. 403, considered.

RULE NISI to justices of Essex to shew cause why a writ of certiorari should not issue to remove and quash the conviction of one Alfred Lacey on a charge, under s. 12 of the Licensing Act, 1872, of having been found drunk on licensed premises.

From the affidavit filed on behalf of the justices, and from the depositions taken on the hearing of the charge, it appeared that at 10 P.M. on Sunday, December 20, that being the closing hour for licensed premises, a police constable who was on duty near the Bell Inn, Chipping Ongar, saw several persons leave the premises and saw the door closed. Not being satisfied that all were out, as he had seen Lacey go into the house about 9.15, he waited some minutes and went to the bar window, where he heard persons inside talking and bad language being used. He tried the side door, which was locked, but it was ultimately opened by Mrs. Smith, the landlord's wife, the time being then about 10.20 P.M. The constable went into the private bar, where he found Lacey standing up and leaning on the counter drunk. Upon his asking the landlord how Lacey came to be there, the landlord answered that he was a lodger and had hired a bed there. Lacey, who refused to give his name, was detained in the police station till he was sufficiently sober to walk home. The landlord and his wife were called to shew that Lacey was not drunk and had engaged a bed, but the justices stated that they disbelieved their evidence so far as

1897

REG. v. PELLY.

it contradicted the evidence for the prosecution, and they found as facts that when the constable obtained admission Lacey was drunk on the licensed premises after closing hours, and that he had not engaged a bed and was not a lodger at or inmate of the licensed premises, and was not intending to sleep there that night. The present rule was granted upon the application of Lacey on the ground that the expression "licensed premises" in s. 12 of the Licensing Act, 1872, meant premises while open to the public and before closing time.

J. C. Earle, for the justices, shewed cause against the rule. The conviction was right. The premises do not cease to be licensed premises after closing hours. The case of *Lester* v. *Torrens* (1), upon which the other side rely, is entirely distinguishable; it only decided that a licensed person who was found drunk on licensed premises in his own occupation during closing hours was not within the section. It is true that the applicant could have been convicted under s. 25 of the Act of 1872 for being on licensed premises in contravention of the closing regulations, but that does not affect his liability to be proceeded against under s. 12.

John Ogle, in support of the rule. The case is concluded by *Lester* v. *Torrens* (1), where the question whether, within the meaning of s. 12 of the Licensing Act, 1872, licensed premises remain licensed premises during closing hours was distinctly raised and decided. The closing hours limit the use of the premises as licensed premises; they are then the landlord's premises, but they are not licensed premises. Although *Lester* v. *Torrens* (1) was the case of the landlord himself being found drunk on his own premises, the arguments in that case are equally applicable to the case of a private person.

HAWKINS J. [After stating the facts substantially as above, the learned judge proceeded:—] I am of opinion that this rule should be discharged. It is unnecessary to consider the evidence in detail, for the justices have found as facts that the applicant was drunk when found by the constable, and that the

(1) 2 Q. B. D. 403.

excuse that he had hired a bed in the house was absolutely untrue; I will only say that the facts stated in the affidavit shew that those conclusions are correct. It is said on behalf of the applicant that, if a man is found drunk on licensed premises five minutes before the closing hour, he is liable to be fined under this section, and in substance it is said that if he remained after closing time for the purpose of getting sober, or in order to obtain more liquor, and were found drunk ten minutes after the premises were closed, he could not be fined under the section. To support that contention the case of *Lester* v. *Torrens* (1) was relied upon. I absolutely concur with all that was there said by the learned judges with reference to the particular charge in that case, which was against the licensee himself, who was found drunk on his own licensed premises after closing hours at a time when all the customers had gone and the premises were not being used as a public-house at all; the landlord lived on the premises, which were his private dwelling, and all that was proved was that while using them as his private dwelling he was found in a state of intoxication. Under those circumstances, the Court said that the Act could not mean that the landlord was to be subject to a penalty if he were found drunk while using the premises solely as his private dwelling. It would indeed be very unreasonable to construe the section in any other way, for if he might be convicted under the circumstances of that case, he might be convicted if found drunk in his house at five or six o'clock in the morning. I agree with that decision; the landlord was there a mere private individual, doing that which any one may do in his own house; what he did had no connection with his trade as the occupier of licensed premises. In the present case it is true that the applicant was not found drunk during the hours when the licensed premises were open, but he was so found a few minutes after they were closed. There is no doubt that he was using this public-house as though he had the landlord's permission so to use it; he entered it for the purpose of using it as licensed premises, and never quitted it until found

(1) 2 Q. B. D. 403.

1897

REG. v. PELLY.

Hawkins J.

by the constable. I cannot entertain a doubt that he was found drunk on licensed premises, and I am fortified in that conclusion by the language of s. 25 of the Licensing Act, 1872, which enacts that "if, during any period during which any premises are required under the provisions of this Act to be closed, any person is found on such premises, he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on such premises, or a bonâ fide traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding forty shillings." According to that section, if, during any period during which the premises, although they do not cease to be licensed premises, are required to be closed, a person is found on them without reasonable excuse, he is liable to a penalty of forty shillings, and it certainly seems somewhat absurd that if a man is found sober on licensed premises after closing time he is liable to a fine of that amount, while if he is found there drunk, ten shillings is the maximum fine. I think, however, that the present conviction was fully justified, and that a man who enters a public-house and chooses to get drunk there, who does not leave it at closing time, and is afterwards found there drunk at a time when the house ought to be closed, he having remained there for the purpose of using the house as licensed premises, is liable to be convicted under s. 12.

LAWRANCE J. I am entirely of the same opinion. The case of *Lester* v. *Torrens* (1), which was relied upon by the appellant, does not support his contention. Were it not for an observation of Mellor J., who did not express a formed opinion but a mere inclination to an opinion, there would be no ground whatever for citing that case as an authority for the applicant. In fact, in the very next sentence of his judgment he draws the distinction which is material to this case. I agree with the judgment of my learned brother, and I will only add that I very much doubt whether licensed premises can be said to be

(1) 2 Q. B. D. 403.

really closed merely because the landlord has locked the door, when he has got a man upon his premises in such a drunken condition that he does not know how to dispose of him.

1897

REG. v. PELLY.

Rule discharged.

Solicitors for applicant: *Haynes & Clifton, Romford.*
Solicitor for justices: *C. Smith, Ongar.*

W. J. B.

ANDREWS, APPELLANT; DENTON, RESPONDENT.

1897
May 5.

Licensing Acts — Offences — Selling Intoxicating Liquors without Licence — Sale by Holder of Licence after Temporary Authority granted to Another — Ale House Act, 1842 (5 & 6 *Vict. c.* 44), *s.* 1—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The respondent, being the duly licensed keeper of a beerhouse, remained in possession of the premises and sold beer thereon after a temporary authority to carry on the business on the same premises had been granted, under 5 & 6 Vict. c. 44, s. 1, to another person in contemplation of the transfer of the licence and the possession of the premises to him:—

Held, that the respondent was not liable to be convicted under s. 3 of the Licensing Act, 1872, of the offence of selling intoxicating liquors without a licence.

CASE stated by a metropolitan police magistrate sitting at the Thames Police Court.

The appellant was summoned before the magistrate to answer an information preferred by the appellant, an inspector of the metropolitan police force, charging the respondent with having, on October 6, 1896, "unlawfully sold certain intoxicating liquor, to wit, beer, without being duly licensed to sell the same, contrary to s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94)."

The following material facts were proved before the magistrate, and stated in the case:—

The respondent, who had from June 29, 1896, held the licence of the Bricklayers' Arms beerhouse, Devons Road, Bromley, in the county of London, on August 28, 1896, gave notice to the police at Bow police station of a proposed application to the sitting magistrate at the Thames Police Court for a

1897

ANDREWS v. DENTON.

temporary authority (usually called a protection order) under s. 1 of the Alehouse Act of 1842 (5 & 6 Vict. c. 44), to one T. Jocelyn to carry on the business of the Bricklayers' Arms beerhouse, and of a proposed subsequent application to the licensing justices for the Tower division of the county of London, under s. 4 of the Alehouse Act of 1828 (9 Geo. 4, c. 61), to transfer the licence of that beerhouse from the respondent to Jocelyn. Such notice was given in accordance with the usual practice, which is that the outgoing tenant gives notice to the police of his intention to apply, so that they may make inquiries in regard to the incoming tenant.

On October 3, 1896, the protection order was granted by the sitting magistrate at the Thames Police Court to Jocelyn. Both the respondent and Jocelyn were present when the authority was given, and the justices' and excise licences held by the respondent in respect of the Bricklayers' Arms were produced to the magistrate. The justices' licence had been indorsed by the respondent to the following effect: "I hereby assign all my right title and interest in this certificate to T. Jocelyn. 3, 10, 96," and such indorsement was signed by the respondent. The magistrate thereupon granted his authority in the prescribed form under his hand and seal to Jocelyn "to use, exercise, and carry on the business of a beerhouse keeper at the house and on the premises" of the Bricklayers' Arms. The application for the protection order was made and granted in accordance with the usual and convenient practice, i.e., before the change at the licensed premises has taken place.

[With reference to the above-mentioned indorsement, the magistrate was of opinion that it was merely signed in view of such change at some future time, and that it was not an effectual or absolute assignment, but was merely conditional upon the grant of protection and the due completion by the transferee of the contract between the parties.]

On October 5, 1896, a similar temporary authority was granted at the same court to the respondent with reference to the Alma beerhouse, West India Dock Road, into which premises he proposed to remove.

Some dispute had arisen between the respondent and Jocelyn

with respect to the transfer to the latter of the Bricklayers' Arms, and the respondent continued in possession of that beer-house and the premises until October 6, and was found to be selling beer thereon on that day. On October 9 the dispute had been settled, and on the afternoon of that day the change took place. The respondent gave up possession to Jocelyn of the Bricklayers' Arms, and handed to him the justices' and excise licences, and moved to the Alma beerhouse. On October 26 the licensing justices of the Tower division at a special transfer sessions transferred the licence of the Bricklayers' Arms to Jocelyn.

The magistrate dismissed the summons, being of opinion that the respondent had committed no offence, as he was, under the circumstances stated in the case, licensed to sell beer at the Bricklayers' Arms on October 6.

The question for the opinion of the Court was whether the magistrate's decision was right in law.

Danckwerts, for the appellant. The magistrate ought to have convicted. The protection order determined the respondent's authority to sell beer under his licence. It was held in *Price* v. *James* (1) that the person to whom a protection order is granted is not in the position of a licensed person for the purpose of applying for a renewal of the licence; but it is submitted that he is for all other purposes. From the moment a protection order is indorsed on the licence the proposed transferee is the only person authorized to carry on the business on the premises; there cannot be two persons authorized at the same time. Transfers of licences under the Alehouse Act of 1828 do not take effect until there has been a change of possession, and the Alehouse Act of 1842, s. 1 (2), only authorizes the

(1) [1892] 2 Q. B. 428.

(2) The statute 5 & 6 Vict. c. 44, s. 1, empowers justices sitting in petty sessions at a time when no special session shall be holden, in those cases where special sessions are empowered by 9 Geo. 4, c. 61, to transfer or grant licences, by indorsement on any licence granted at any general licensing meeting, to authorize any person not disqualified by 9 Geo. 4, c. 61, to whom it shall be proposed to transfer or grant any such licence, to use, exercise, and carry on the business of a licensed victualler at the same house and on the premises, and there to sell

1897

ANDREWS v. DENTON.

granting of a protection order where the intended transferee has gone into possession and the transferor has gone out. The words in the second proviso to s. 1, "after the obtaining such authority," mean "from the moment the authority is given." No one but the occupier of the premises can apply for a licence. Both the occupier and his intended transferee must apply for a protection order, which, when granted, operates as a new licence to the transferee until the next special transfer session. Either the grant of the protection order put an end to the respondent's authority to sell, or the protection order itself was bad, so that Jocelyn was not entitled to sell under it when he went into possession. If either of those propositions be established by the decision of this Court the police authorities will know how to act. [He also referred to *Reg.* v. *Justices of Liverpool.* (1)]

Lawson Walton, Q.C., and *Bodkin*, for the respondent, were not heard.

HAWKINS J. I am of opinion that the magistrate's decision was right. The licence is indisputable so far as regards the extent of the authority it gave to Denton. It was duly issued by the magistrates in June, 1896, to remain in force until April 5 following. Denton was carrying on his business as a beerhouse-keeper in a house which he contemplated transferring to Jocelyn, who was also to be the transferee of the licence. No transfer of the licence had been actually signed by the magis-

such exciseable liquors as might theretofore have been lawfully sold and retailed therein; and provides that the authority so granted shall continue and be in force until the then next ensuing special session, which shall be holden for the division within which such house and premises shall be situated and no longer; at which special session the justices upon application made to them pursuant to the said Act, touching any transfer or grant of licence to the party to whom such authority shall have been so given, shall hear and dispose of such application: "provided that any person or persons who shall be authorized under the provisions of this Act to continue to carry on the business of a licensed victualler shall after the obtaining such authority, and so long as the same shall continue in force, be subject to all the powers, regulations, proceedings, penalties, and provisions declared by or contained in any Act or Acts in force touching the regulation, government, or control of licensed keepers of inns, alehouses, and victualling houses, in like manner as if the same had been repealed and re-enacted."

(1) (1883) 11 Q. B. D. 638.

trates when the offence alleged against Denton is said to have been committed. Denton remained in possession; the licence remained with him, and I see no reason for saying that it was cancelled by any act either of the parties or of the magistrate who granted the protection order to Jocelyn. I do not say what the effect would have been if beer had been sold under the protection order, because I prefer not to say what will afford a defence to a man in the event of a criminal charge being made against him, or what will be sufficient to secure his punishment; I prefer to deal only with the facts actually before me. In this case we are concerned only with the question, Has Denton himself sold beer, contrary to the provisions of the Act of Parliament, in the house for which he was licensed? He continued in the house, and he held the licence to carry on the business in that house at the time he sold; but this happened—he had been negotiating with Jocelyn for the transfer to him of the licence, when the proper time came to transfer it, and of the possession of the house altogether. In the meantime, the magistrate had power to grant, and did grant, Jocelyn a protection order until he could get a proper transfer. That protection order may have been good or bad; it may be that it did not authorize Jocelyn to sell until he was actually in full possession of the premises. I do not say how that is. All I am concerned to say to-day is that Denton had the licence; that he continued in the occupation of the premises and carried on the business down to a time covering the period during which the illegality is said to have been committed by him, and that I see no ground whatsoever for holding that his licence was cancelled or terminated. In a criminal case we ought to have conclusive proof that the offence charged has been committed. In my view there are no facts suggested here which justify the conclusion that Denton was prevented from carrying on his business according to the licence which he had obtained in June, 1896. If that be so, the magistrate was quite right in acquitting him of the charge.

WRIGHT J. I am of the same opinion. I do not myself assent to the argument for the appellant that the protection

1897

ANDREWS v. DENTON.

Wright J.

order could not be granted until there had been an actual change of possession. The words of the statute do not seem to me to limit the occasion for granting a protection order in the way suggested. I think they really refer to cases where there is, or is going to be, a change of possession. Whether that be so or not, I cannot see that Denton's licence to sell beer on these premises had been in any way cancelled. I am, therefore, of opinion that the offence charged—namely, "selling or exposing for sale by retail intoxicating liquors without being duly licensed to sell the same"—was not proved. I think that Denton was duly licensed, and that the delay of a few days pending the completion of the transfer did not raise any difficulty.

Judgment for the respondent.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Maitland, Peckham & Co.*

W. A.

1897
March 11, 16.

[IN THE COMMERCIAL COURT.]

SMALL AND OTHERS *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

Insurance, Marine—Barratry of Master—Master Part-owner of Ship—Barratry as against Mortgagee of Master's Interest.

An act of a master and part-owner of a ship, which would be barratrous as against his co-owners, is barratrous as against the mortgagee of his interest in the ship.

TRIAL of a preliminary question in an action upon a policy of marine insurance.

The following statement of facts is taken from the written judgment of Mathew J.:—

This was an action brought by the executors of Samuel Small to recover a total loss upon a policy of marine insurance alleged to have been effected on his behalf with the defendant association on the ship *James Livesey*. For the defence it was alleged that the policy had been made for and on behalf of one

Wilkes, the master of the ship, and that the vessel and her cargo had been wilfully cast away by Wilkes. It was ordered upon a summons for directions that the question should be tried whether, upon the assumption of the alleged barratrous conduct of the master, there was a defence to the action, and liberty was given to reserve the trial of the question whether the charge against the master was well founded until the preliminary point had been disposed of.

Upon the trial before me it appeared that Wilkes was the son-in-law of Samuel Small, and that he had applied to Small to enable him to purchase with two co-owners the ship *James Livesey*, of which he was to be appointed captain. The price of the ship was 1950*l.*; Wilkes was to have twenty-four-sixty-fourth shares in the ship, and the remaining shares were to be divided between Horne and Townsend, the co-owners. The cost of Wilkes' shares was 731*l.* 5*s.*, and the outfit of the ship cost the co-owners a considerable sum. Small agreed to lend Wilkes 700*l.* upon having his advance secured by a mortgage of Wilkes' shares in the ship, and his solicitors, Messrs. Davis & Lloyd, were instructed to act for him in obtaining from Wilkes the mortgage and such other securities as they thought necessary. The business was transacted by Wilson, the managing clerk of Davis & Lloyd. It was stated by Wilson that Wilkes was informed by him that the advance would not be made unless, in addition to the mortgage, satisfactory arrangements were made to cover Small's interest as mortgagee by insurance. Wilson, in the first instance, stipulated that policies of insurance should be handed to him to be deposited with Small's securities; but Wilkes pointed out that the insurances on the ship were to be effected through a firm of Carlsen & Co., who were to act as ship's husbands, and that the co-owners would not consent to their parting with the policies. Upon Wilkes' promise that the insurance should be effected for Small, Wilson did not insist upon a deposit of the policies. The ship was afterwards covered by insurances effected through the firm of Carlsen & Co. upon the instruction of Wilkes and his co-owners. Wilson's evidence was corroborated by Wilkes.

1897

SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. Assuming that the policy was effected for the joint benefit of the mortgagor and mortgagee, and that the ship was in fact cast away by the mortgagor, the fraudulent act of the mortgagor affords a good defence to an action by the mortgagee on the policy. The mortgagee is not to be deemed the owner of his share, nor is the mortgagor to be deemed to have ceased to be owner: see s. 34 of the Merchant Shipping Act, 1894, which in effect reproduces s. 70 of the Merchant Shipping Act, 1854; and the act of the mortgagor, who is in possession as owner, is not barratrous as against his mortgagee. A charterer who is privy to a fraudulent act of the master involving the loss of the ship is the agent of the owner, and the loss is not a loss by barratry: *Hobbs* v. *Hannam* (1); the present is a far stronger case, for the mortgagee has not the legal ownership of, but merely an equitable charge on, his shares, and the mortgagor, being owner, cannot commit barratry, which must be a fraud on the owner. It is true that a master who is part owner may be guilty of barratry as against his co-owners, but his mortgagee is not a co-owner. [He also cited Phillips on Insurance, 3rd ed. par. 1083.]

Carver (*W. E. Lloyd* with him), for the plaintiffs. Barratry of the master and mariners means a fraudulent criminal act to the detriment of the ship, and where there has been a barratrous act involving the loss of the ship all innocent parties interested in the ship can recover against underwriters in respect of their loss. Where the master is part-owner, his co-owners can recover: *Jones* v. *Nicholson* (2); and the position of a mortgagee is analogous to that of a co-owner, his interest being distinct from that of his mortgagor. The fraud of the mortgagor is not in law the fraud of the mortgagee, and the latter would only be disentitled to recover if he were so bound up with the mortgagor as to be affected by his conduct.

Cur. adv. vult.

March 16. The following written judgment was delivered by

MATHEW J. [After stating the facts as above, the learned judge proceeded:—] It was not disputed that Small was

(1) (1811) 3 Camp. 93. (2) (1854) 10 Ex. 28: 23 L. J. (Ex.) 330.

intended to have an interest in the insurance upon the shares of Wilkes, but it was argued for the defendant association that the evidence went to shew that Small was meant to have only an equitable charge on the policies effected for Wilkes, and that Small had no better right against the defendant association than Wilkes would have had. But I am satisfied that the insurance was effected to cover the interest of Small as mortgagee and of Wilkes as mortgagor. It did not appear that Wilkes' intention to insure for Small had been communicated to Carlsen & Co. But the question is not what Carlsen & Co. knew, but what their principal, Wilkes, intended when he instructed them to insure.

It was further contended for the defence that if the policy were made on behalf of Wilkes as mortgagor, and the ship was to be taken to have been wilfully cast away by him, the plaintiffs could not recover, because the act of Wilkes would not be barratrous as against Small. It was admitted that as against his co-owners Horne and Townsend the master would be guilty of barratry: *Jones* v. *Nicholson*. (1) But it was said that the interests of mortgagor and mortgagee were separate and independent, and reliance was placed on the authority of *Hobbs* v. *Hannam*. (2) It was there held by Lord Ellenborough, as I understand the judgment, that where there had been a demise of the ship, and the master was appointed by the charterer, an act which was barratrous against the charterer was not so against the owner, on the ground, as it would seem, that no fraud had been committed upon the owner. It was said that the position of the mortgagee in this case was the same as that of the owner in *Hobbs* v. *Hannam*. (2) In support of this contention the Merchant Shipping Act, 1894, s. 34, was referred to. But the case of *Irving* v. *Richardson* (3), upon a similar section in 6 Geo. 4, c. 110 (s. 45), shews to what extent and in what sense a mortgagee has a distinct interest from his mortgagor. The mortgagee of a ship or share, as between him and the mortgagor, is owner so far as may be necessary for making his mortgage an available security, and their position would seem

(1) 10 Ex. 28; 23 L. J. (Ex.) 330. (2) 3 Camp. 93.
(3) (1831) 2 B. & Ad. 193.

1897

SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

Mathew J.

to be clearly analogous to that of co-owners. The mortgagee in this case took part in placing Wilkes in the position of master; and Wilkes, if he committed a barratrous act, would be guilty of a fraudulent breach of trust against his mortgagee as well as against his co-owners. An act which it is admitted would be barratrous as against Horne and Townsend would have the same character as against Small. It does not seem to me necessary to have recourse to the general words in the policy. They are added for the purpose of preventing a narrow or laboured construction of the words describing the peril insured against, and might be applicable even though the position of the assured was less clearly analogous to that of co-owner than it is in the present case. Here it seems to me the barratrous conduct of the master would be covered by the express terms of the policy. I give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Warriner & Co., for Davis & Lloyd, Newport, Mon.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

In the Matter of ESTATE DUTY PAYABLE ON THE DEATH OF THE SECOND EARL COWLEY.

1897
March 29, 30;
April 1;
May 1.

Revenue—Estate Duty—Mortgage of Settled Property—Value of Property Passing on Death of Tenant for Life—Finance Act, 1894 (57 & 58 *Vict.* c. 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 1 (*a*), *sub-s.* 7 (*b*).

Property being settled upon a father for life with remainder to his son in tail, the father and son joined in executing a disentailing assurance whereby they settled the property to such uses as they should jointly appoint, and subject thereto in the same manner as it was theretofore settled. The father and son jointly borrowed money on mortgage of the settled property, and under their joint power appointed the property to the mortgagees. The money so borrowed was applied partly to the use of the father and partly to the use of the son. In 1895, while the mortgage was still subsisting, the father died, and the son succeeded to the equity of redemption of the settled property:—

Held, that for the purposes of computing the value of the property passing on the death of the father and liable to estate duty under the Finance Act, 1894, there must be deducted from the gross value of the settled property the whole amount of the mortgage debt, including the portion of it applied to the use of the son.

Petition of Henry Arthur Mornington, Earl Cowley, on appeal from the Commissioners of Inland Revenue under s. 10, sub-s. 1, of the Finance Act, 1894, pursuant to rule 3 of the Rules of the Supreme Court under the said section.

On July 25, 1863, the Earl of Mornington died, having by his will devised and bequeathed the residue of his real and personal estate to trustees to pay certain annuities, and subject thereto in trust for Henry Richard, first Earl Cowley, for life, and after his death in trust for William Henry, second Earl Cowley (then Viscount Dangan), for life, and after his death for the first and other sons of the second Earl successively in tail male. On July 15, 1884, the first Earl Cowley died, and the second Earl Cowley became entitled in possession. By various indentures of mortgage the second Earl Cowley mortgaged his life interest in the trust property to the London Assurance Corporation for sums amounting in all to upwards of 140,000*l*. On January 13, 1887, the petitioner (then Viscount Dangan), the eldest son of

1897

EARL COWLEY'S ESTATE, *In re.*

the second Earl, attained the age of twenty-one. On January 14, 1887, a disentailing assurance was inrolled in the High Court, which witnessed that the second Earl and the petitioner joined in resettling the trust property to such uses as they should jointly appoint, and until such appointment to the use of the second Earl for life by way of restoration of the estate previously vested in him, with remainder, subject to a jointure to the second Earl's wife and a portion for a younger child, to the petitioner in tail with remainders over. By an indenture of mortgage dated June 8, 1888, and made between the second Earl and the petitioner and the Prudential Assurance Company, after reciting that there was then due from the second Earl to the London Assurance Corporation in respect of capital and interest the sum of 150,853*l.* 6*s.* 7*d.*, and that the Prudential Assurance Company had agreed to pay off the said sum of 150,853*l.* 6*s.* 7*d.* due to the London Assurance and to advance to the second Earl and the petitioner a further sum of 59,146*l.* 13*s.* 5*d.*, making in all the sum of 210,000*l.*, and reciting that by a deed of even date the London Assurance had assigned to the Prudential Assurance Company the life interest of the second Earl and the several mortgage debts due from him to them, it was witnessed that the second Earl and the petitioner jointly covenanted to repay the said sum of 210,000*l.*, and in the exercise of their power jointly appointed, and by virtue of their respective estates and interests in the trust property as beneficial owners conveyed, the trust property to the Prudential Assurance Company as security for the repayment of the same. By an indenture of resettlement dated June 9, 1888, made between the second Earl and the petitioner and certain trustees, the second Earl, for divers considerations therein mentioned, covenanted to pay to the petitioner during the life of the second Earl an annuity of 3000*l.*

By various indentures between December, 1889, and September, 1893, the second Earl and the petitioner further charged the trust property with sums amounting in all to 20,000*l.* On February 28, 1895, the second Earl died. At that date the aggregate of the mortgage debts upon the trust property amounted to 230,000*l.*, of which 199,987*l.* 11*s.* 8*d.* had been

paid to or for the second Earl, and the residue had been paid to the petitioner. There were at that date still subsisting two of the annuities created by the will of the Earl of Mornington—namely, one of 1000*l.* to Lady Victoria Wellesley, and one of 500*l.* to Captain Arthur Palliser.

The petitioner, as the person to whom the trust property passed on the death of the second Earl, and as accountable for the estate duty, delivered to the Commissioners of Inland Revenue an affidavit which shewed the aggregate value of the property to be 538,426*l.* 11*s.* 1*d.* From that sum, for the purpose of assessing the value of the property passing on his father's death, and upon which estate duty was payable, he claimed to deduct, in Sched. III. to his affidavit, (1.) 5114*l.* 15*s.*, being the value of the annuity to Lady Victoria Wellesley; (2.) 3809*l.* 15*s.*, being the value of the annuity to Captain Arthur Palliser; (3.) a sum of 216*l.* 7*s.*; (4.) the sum of 199,987*l.* 11*s.* 8*d.* above mentioned as having been paid to the second Earl out of money borrowed on mortgage; and (5.) the sum of 65,200*l.*, being the capital value of the annuity of 3000*l.* covenanted to be paid to the petitioner by the second Earl, and ceasing on the second Earl's death. The Commissioners of Inland Revenue allowed the deduction of items (1.), (2.), and (3.) in the said schedule, but disallowed the deduction of items (4.) and (5.). The petitioner appealed, and prayed a declaration that he was entitled to deduct (1.) the sum of 199,987*l.* 11*s.* 8*d.*; or, alternatively, (2.) the sum of 230,000*l.*, being the whole amount of the mortgage debt; (3.) the above-mentioned sum of 65,200*l.*

Haldane, Q.C., and *H. Fellows* (1), for the petitioner. By s. 1 (2) of the Finance Act, 1894, estate duty is to be payable

(1) The Divisional Court intimated that in all cases of petitions under the Finance Act, 1894, they would hear two counsel on each side.

(2) By s. 2, sub-s., 1 of the Finance Act, 1894, "Property passing on the death of the deceased shall be deemed to include the property following, that is to say—

"(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

By s. 7, sub-s. 1, "In determining the value of an estate for the purpose

BIBL.

1897

EARL COWLEY'S ESTATE, *In re.*

on property passing on the death of the deceased. All that passed on the second Earl's death was an equity of redemption, and the value of that equity was alone the subject of duty. By s. 2, sub-s. 1, property passing on death is to be deemed to include property in which the deceased had an interest ceasing on his death, to the extent to which a benefit accrues by the cesser of such interest. The father's interest extended only to the income of the property less the interest on the mortgage debt. If part of a settled estate were sold during the lifetime of a tenant for life, on his death no duty would be chargeable in respect of the part sold, and a mortgage is in substance a sale of the property pro tanto.

Sect. 7, sub-s. 1, which provides that in the cases to which it applies only certain classes of incumbrances shall be deducted, does not apply to settled estates at all. For it says that allowance shall be made for reasonable funeral expenses, and it cannot have been intended to impose upon a remainderman the expense of burying a tenant for life. But assume that the sub-section does so apply, the present case falls, to the extent of 199,987*l.* 11*s.* 8*d.*, within the exception of an incumbrance created wholly for the deceased's own use and benefit, and taking effect out of his interest. The power of appointment under which the mortgage was granted was partially carved out of the father's life interest, and the section does not require that it should have taken effect *wholly* out of his interest. If, then, s. 7, sub-s. 1, applies to this case, the petitioner is entitled

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of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made

"(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Sub-sect. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

"(*b*) if the interest extended to less than the whole income of the property be the principal value of an addition to the property equal to the income to which the interest extended."

to deduct the mortgage debt to the extent of 199,987*l.* 11*s.* 8*d.* If it does not apply, he is entitled to deduct the whole 230,000*l.* Secondly, the petitioner is entitled further to deduct the capital value of the annuity of 3000*l.* which was paid to him during his father's lifetime. It is said by the Crown that the property to which the petitioner succeeded was enlarged by the cesser of the annuity; but eo instanti it was lost to him. He was no better off by its cessation, and therefore no benefit accrued to him therefrom.

Sir Richard Webster, A.-G., and *Sir R. B. Finlay, S.-G.* (*Vaughan Hawkins* with them), for the Crown. There is a confusion between the property taxed and the persons affected by the taxation. Sect. 1 does not say that duty is to be paid only on property passing *to a person*. The question is as to the extent to which property passed, and not as to the extent to which the petitioner benefited. Property passed on the death of the father to the full extent of the mortgaged property without any deduction in respect of the mortgage debt. Sect. 7, sub-s. 1, clearly applies to settled estates. The words "for reasonable funeral expenses and for debts" mean for expenses and debts where payable, and do not exclude the application of the sub-section to cases in which such expenses and debts are not payable. By the execution of the power of appointment, the father mortgaged his life interest and the son his remainder. If these interests had been separately mortgaged by different deeds, it would be clear that no deduction could be made. It can make no difference that they happen to have been mortgaged by the same deed. Limitations created by the execution of a power must be read as if they were introduced into the deed creating the power: *Lord Braybrooke* v. *Attorney-General* (1); *Attorney-General* v. *Chapman*. (2) If that principle be applied to this case the disposition by the mortgage deed must be read into the disentailing deed of 1887; and by that latter deed so read there was a conveyance of the life estate by the father and of the remainder by the petitioner. The fact that the father as protector of the settlement joined in that deed is immaterial, for

(1) (1860) 9 H. L. C. 150. (2) [1891] 2 Q. B. 526.

1897

EARL COWLEY'S ESTATE, *In re.*

he only charged his life interest which did not pass on his death. Therefore, the case must be treated as if the only conveyance was of the interest of the petitioner. The incumbrance, so far as it binds the property, came wholly out of the estate tail. Secondly, no deduction is allowable in respect of the cessation of the 3000*l.* annuity. The 3000*l.* by which the estate was enlarged on the father's death was not the same 3000*l.* which the petitioner had previously enjoyed, for that was carved out of the father's life estate.

Haldane, Q.C., in reply. The two cases cited are not in point. They turned respectively on the language of very special sections—s. 12 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and s. 38 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12). The mortgage here was one mortgage of the whole, and not a separate mortgage of two different interests. The exercise of the power of appointment effected a merger of the life interest in the remainder. Suppose the money raised by the mortgage, instead of being spent as it was, had been invested and handed to the trustees of the settlement as a mere change of investment, the Crown could not have charged duty both on the mortgaged property and also on the invested money.

May 11. The judgment of the Court (Pollock B. and Bruce J.) was read by

BRUCE J. In this case a petition has been filed by the third Earl Cowley pursuant to rule 3 of the Rules of the Supreme Court made under s. 10 of the Finance Act, 1894, for the determination of the amount of estate duty payable in respect of property which within the meaning of the above Act passed on the death of his father, the second Earl Cowley.

By s. 1 of the Finance Act, 1894, it is enacted that in the case of every person dying after the commencement of Part I. of the Act there shall, save as thereinafter expressly provided, be levied and paid upon the principal value ascertained as thereinafter provided of all property real and personal, settled or not settled, which passes on the death of such person, a duty called estate duty. By the 2nd section it is enacted, so far as is

material to this case, that property passing on the death of the deceased shall be deemed to include, (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. Sect. 7 contains provisions for determining value. The 7th sub-section of s. 7 seems to us to contain the material provisions affecting the present case. By this "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, (*a*) if the interest extended to the whole income of the property, be the principal value of that property, and (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

Now it is admitted that property passed, or what is the same thing for present purposes, that property is to be deemed to have passed, within the meaning of the statutes on the death of the second Earl Cowley, and the whole contention has been as to the value of the benefit accruing or arising from the cesser of the interest ceasing on his death. It has been admitted by the Crown that certain annuities charged on the estate by virtue of the will of William Richard Arthur, Earl of Mornington, and numbered items 1 and 2 in Sched. III. of the petitioner's affidavit referred to in the petition, p. 32, par. 32, and the capitalised value of certain interests referred to in item 3 of the same schedule, must be deducted in order to arrive at the value of the benefit accruing. The amount of these three items is 9140*l.* 17*s.*

The principal dispute has arisen with respect to mortgages on the property amounting in the whole to 230,000*l.* The question we have to determine is whether these mortgages are to be taken into account in assessing the value of the benefit accruing or arising from the cesser of the interest ceasing on the death of the second Earl Cowley. It is quite clear that the interest of the second Earl Cowley extended to less than the whole income of the property. It extended only to the income of the property after payment of the sums payable in respect of the admitted items 1, 2 and 3 already mentioned. The question presents itself, if the income to which the interest of the deceased

1897

EARL COWLEY'S ESTATE, *In re.*

Bruce J.

extended is to be taken as the income of the property after deducting the charges on the property 1, 2 and 3, why should not the income to which his interest extended be limited in like manner to the amount he was entitled to receive after the interest on the mortgages had been paid? The argument of the Attorney-General was that the mortgages were not charges upon the property passing on the death of the second Earl. He contended that so far as they were charges on the interest, which expired upon the death of the second Earl, they were charges on his life interest only. But it seems clear that by the mortgages in question the second Earl Cowley as tenant for life and the petitioner as remainderman conveyed or appointed to the mortgagees the whole of their respective estates, and therefore that the charges were charges on the fee simple of the estate, and remained in force notwithstanding the death of the second Earl; so that the charges were in no respect diminished by the death of the deceased. With reference to this view of the facts, the Attorney-General urged that the charges upon the property, so far as they extended beyond the life interest of the second Earl, were not to be considered, because they could not have been created without the concurrence of the third Earl, and were not, properly speaking, charges on the property passing. But we do not think it is possible to adopt this contention. The life estate of the second Earl no doubt never passed; but it was an interest in property, and that interest ceased on the death of the second Earl, and this property, the interest in which was so determined, is to be deemed (s. 2, sub-s. 1 (*b*)) as passing "to the extent to which a benefit accrues or arises by the cesser of such interest." The value to be determined in this case is not the principal value of the property, but the value of the benefit accruing or arising from the cesser of the interest which existed during the life of the second Earl, and ceased at his death. In dealing with interests ceasing on the death of the deceased, the Legislature deals with interests which in fact do not pass, although the property in which the interests subsisted is to be deemed to have passed to the extent above mentioned. The value of the benefit accruing or arising by the cesser of an interest would be a difficult matter to determine had no rules

been laid down in the Finance Act for estimating such value. But s. 7, sub-s. 7, enacts that the value of the benefit to be determined by the cesser of the interest in a case where the interest extended to less than the whole income of the property is "the principal value of an addition to the property equal to the income to which the interest extended." In other words, it is to be determined by ascertaining the value of the income to which the interest of the second Earl extended. That income was the income which remained after satisfying the admitted deductions 1, 2 and 3, and the amount of interest due on the mortgages. The interest of the second Earl was an interest for his life subject to the mortgages, and the mortgages undoubtedly remained subsisting charges at his death. The benefit accruing from the passing of the property was no more than the capitalised value of the income which the second Earl actually had a right to enjoy. In other words, it was the value of the income to which the equity of redemption of the life estate of the second Earl extended. For the reasons we have given, we think the value of the benefit accruing or arising from the death of the second Earl must be reckoned exclusively of the interest payable at the date of his death to keep down the mortgages and other charges.

In case an objection should be taken to this construction of the statute on the ground that it would lead to the result that in case of a mortgage on a life estate the value of the benefit arising from the cesser of the life interest must be taken to be based upon the income the life tenant received in his lifetime after the payment of the mortgages, we may observe that we think no such conclusion follows. The value of the benefit accruing from the cesser of an interest ceasing on the death is to be measured by the extent to which a benefit accrues by the cesser of such interest, and in the case where the mortgage is on the life interest only, so that the charge ceases on the death, the interest ceasing on the death of the deceased would extend to the whole income of the property, because at that moment when the property is to be deemed to have passed the interest ceased to be incumbered.

It seems to us that the language of the statute warrants a

1897

EARL COWLEY'S ESTATE, *In re.*

BRUCE J.

broad distinction being drawn between cases where the incumbrances cease at the death, and cases where the incumbrances remain charges on the property after the death. In the present case we do not think it necessary to consider whether the estates of the second and third Earl merged; it is enough, we think, that the rights of the incumbrancers remained in force on the property after the death of the second Earl and affected the interests then subsisting whatever those interests were.

We have not referred to sub-s. 1 of s. 7, because we do not think it applies to cases within sub-s. 7 (*b*) of s. 7. In cases where the principal value of the property is the measure of the amount of the duty to be paid, either generally where the whole estate passes or in cases falling under sub-s. 7 (*a*), the rule as to allowances laid down in s. 7, sub-s. 1, applies. But s. 7, sub-s. 1, has, we think, no application to a case falling under s. 7, sub-s. 7 (*b*).

A further question arises with respect to the capitalised value of certain annuities amounting at the death of the second Earl to 3000*l.* per annum charged on the property, and payable to the third Earl during the life of the second Earl. We think that no deduction can be allowed in respect of the value of these annuities, because they were not existing incumbrances at the moment of the passing of the property. It is true that the third Earl is not a gainer by the extinction of these annuities, because they were payable to him: they were charges for his benefit. But they did not affect the value of the property passing, and cannot be regarded as affecting a diminution of the income to which the interest of the second Earl extended. The result of our judgment is that we allow the second head of the petitioner's appeal which relates to the sum of 230,000*l.* secured by the mortgage. As to the fourth head of appeal, which relates to the sum of 65,200*l.*, the decision of the Commissioners of Inland Revenue will stand.

Decision of Commissioners of Inland Revenue varied.

Solicitors for petitioner: *Collyer-Bristow, Russell & Hill.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

J. F. C.

WILKINSON *v.* DOWNTON.

1897
May 8.

Action—Cause of—Nervous Shock—Practical Joke causing—Remoteness of Damage.

The defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill:—

Held, that these facts constituted a good cause of action.

Victorian Railways Commissioners v. *Coultas*, (1888) 13 App. Cas. 222, and *Allsop* v. *Allsop*, (1860) 5 H. & N. 534, considered.

Further Consideration before Wright J. after trial with a jury.

On April 9, 1896, Thomas Wilkinson, the husband of the plaintiff, went to a race-meeting, and on the evening of the same day the defendant came to the plaintiff's house and represented to her that her husband, while returning in a wagonette with some friends from the races, had met with an accident and had both his legs broken, that he was lying at The Elms public-house at Leytonstone, and had desired the defendant to request the plaintiff to go at once with a cab and some pillows to fetch him home. These statements were false. They were meant by the defendant to be believed to be true, and the plaintiff so believed them, with the result that she became seriously ill from a shock to her nervous system. She also on the faith of the defendant's statement incurred a small expense for railway fares of persons whom she sent to Leytonstone to see after her husband. The jury assessed the expense of the railway fares at 1*s.* 10½*d.*, and the damages for the injury caused by the nervous shock at 100*l.*

It was contended on behalf of the defendant that so far as the damage caused to the plaintiff by nervous shock was concerned the action could not be supported.

Warburton, and *A. N. Talbot*, for the plaintiff.

Abinger, for the defendant.

1897

WILKINSON v. DOWNTON.

WRIGHT J. In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

In addition to these matters of substance there is a small claim for 1*s.* 10½*d.* for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1*s.* 10½*d.* expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley* v. *Freeman*. (1) The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the 100*l.*, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by *Pasley* v. *Freeman* (1) and *Langridge* v. *Levy*. (2) I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical

(1) (1789) 3 T. R. 51. (2) (1837) 2 M. & W. 519.

harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in *Lynch* v. *Knight* (1), the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought (2), the possible infirmities of human nature ought to be recognised, it seems to me that the connection between the cause and the effect is sufficiently close and complete. It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of *Victorian Railways Commissioners*

(1) (1861) 9 H. L. C. 577, at pp. 592, 596. (2) 9 H. L. C. 577, at p. 600.

1897

WILKINSON v. DOWNTON.

Wright J.

v. *Coultas* (1), where it was held in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in *Pugh* v. *London, Brighton and South Coast Ry. Co.* (2) as open to question. It is inconsistent with a decision in the Court of Appeal in Ireland: see *Bell* v. *Great Northern Ry. Co. of Ireland* (3), where the Irish Exchequer Division refused to follow it; and it has been disapproved in the Supreme Court of New York: see Pollock on Torts, 4th ed. p. 47 (*n*). (4) Nor is it altogether in point, for there was not in that case any element of wilful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of *Victorian Railways Commissioners* v. *Coultas* (1) is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in *Allsop* v. *Allsop* (5), which was approved by the House of Lords in *Lynch* v. *Knight*. (6) In that case it was held by Pollock C.B., Martin, Bramwell, and Wilde BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he

(1) 13 App. Cas. 222.
(2) [1896] 2 Q. B. 248.
(3) (1890) 26 L. R. Ir. 428.
(4) [This decision has since been reversed on appeal: *Mitchell* v. *R. R. Co.*, 151 N. Y. 107.—F. P.]
(5) 5 H. & N. 534.
(6) 9 H. L. C. 577.

has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions—such as *Jones* v. *Boyce* (1); *Wilkins* v. *Day* (2); *Harris* v. *Mobbs* (3)—are cited in Beven on Negligence as inconsistent with the decision in *Victorian Railways Commissioners* v. *Coultas*. (4) But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage. In *Smith* v. *Johnson & Co.* (5), decided in January last, Bruce J. and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

There must be judgment for the plaintiff for 100*l.* 1*s.* 10½.

Judgment for plaintiff.

Solicitor for plaintiff: *J. S. Waters.*

Solicitor for defendant: *G. E. Philbrick.*

(1) (1816) 1 Stark. 493.
(2) (1883) 12 Q. B. D. 110.
(3) (1878) 3 Ex. D. 268.
(4) 13 App. Cas. 222.
(5) Unreported.

J. F. C.

Followed. BROOKS v. PRESCOTT. [1948] 1 All E.R. 907.

Applied. BROOKES v. PRESCOTT. [1948] 2 K. B. 133

C. A. 1897 *May* 17.

[IN THE COURT OF APPEAL.]

FRANKENSTEIN *v.* GAVIN'S HOUSE-TO-HOUSE CYCLE CLEANING AND INSURANCE COMPANY AND OTHERS.

Practice—Discovery—Inspection—Documents forming part of Defendants' Case only—Affidavit conclusive.

In an action for an alleged misrepresentation in the prospectus of a company the statement complained of was that 12,500 persons had enrolled themselves as annual subscribers to the company. In an affidavit of documents the defendants stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, but that they objected to produce them on the ground that they were part of the evidence supporting the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants:—

Held, that the plaintiff was not entitled to inspection of the applications.

APPEAL of plaintiff from an order of a judge at chambers reversing the order of a master for inspection of documents.

The action was by a shareholder in the defendant company, which was a company established for the purpose of cleaning, storing, and insuring cycles, against the company and the directors of the company personally. The plaintiff claimed against the directors personally damages for fraudulent representations alleged to have been made in the prospectus of the company, and he claimed against the company rescission of his contract to take shares and rectification of the register of shareholders by removal of his name therefrom on the ground of misrepresentations on the faith of which he had agreed to become a shareholder. One of the misrepresentations alleged in the statement of claim was that the prospectus had stated that in London alone 12,500 persons had enrolled themselves as annual subscribers to the company of 1*l.* 6*s.* per annum, and had actually signed application forms agreeing to become subscribers, whereas in truth very few, if any, persons had enrolled themselves or agreed to become subscribers. An order having been obtained by the plaintiff for discovery of documents,

the defendant company through their secretary made an affidavit of documents in which they stated that they had in their possession (among other documents) "12,500 applications by persons wishing to be enrolled as annual subscribers to the company," but they objected to produce those applications on the ground that they were part of the evidence supporting the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants. The plaintiff having applied at chambers for an order for inspection of these applications, the master granted the application, but the judge on appeal reversed his order.

C. G. Ellis, for the plaintiff. The rule as laid down by the cases on the subject is that the affidavit of the party from whom discovery is sought is conclusive unless the Court can see from the description of the documents given or other admissions made by him that he has erroneously represented or misconceived the nature of the documents, in which case inspection may be ordered. It is contended that in this case it sufficiently appears from the defendants' affidavit that the documents are material to the plaintiff's case. There is no case in which a document has been held privileged from inspection where the effect of the document is the actual matter in issue in the action. Here the effect of these applications, namely, whether they amounted to actual agreements to subscribe 1*l.* 6*s.* per annum to the company, is the very question in the action.

E. U. Bullen, for the defendants, was not called upon.

LORD ESHER M.R. In this action the plaintiff sues in respect of a fraudulent statement alleged to have been made in the prospectus of the company, and he also, by way of alternative, sues in respect of a misrepresentation made without fraud. The statement complained of as untrue is that 12,500 persons had become annual subscribers to the company. The plaintiff has obtained an order for discovery, and in the defendants' affidavit they state that among other documents they have applications to become subscribers from 12,500 persons, but they swear that those documents form part of their case alone,

C. A. 1897

FRANKENSTEIN v. GAVIN'S CYCLE CLEANING AND INSURANCE COMPANY.

Lord Esher M.R.

and have nothing to do with the plaintiff's case. If that be true, then the plaintiff has no right to see those documents. The law on the subject has been laid down in this Court in *Attorney-General* v. *Emerson*. (1) Each of the judges who decided that case held in effect that such an affidavit as the defendants in this case have made must be accepted as conclusive, unless the Court can see, that is to say, is reasonably certain, from the statements of the party making it, that he has erroneously represented or has misconceived the character of the document in question, and that it is of such a character that the party cannot properly swear to the effect to which he is bound to swear in order to claim protection. That being so, the case depends upon the question whether we are reasonably certain that the defendants' allegation that the applications in question have nothing to do with the plaintiff's case but support the defendants' case alone is not true. So far from being reasonably certain of that, I feel convinced that that allegation is true. Therefore the conditions which are necessary in order to enable us to put aside the statement in the defendants' affidavit are not fulfilled, and we are bound to give effect to it. On these grounds the appeal must be dismissed.

A. L. SMITH L.J. I also think that the order of the learned judge was right. In this case the plaintiff sues a company and its directors; and he sets up two causes of action, one against the directors for damages for fraudulent representation, the other against the company for rectification of the register on the ground of misrepresentation. In this action there has been an order for discovery, and the defendants in answer thereto have made an affidavit of documents in the schedule to which they mention the documents in question; and they claim to be privileged from producing them for inspection. Their affidavit states with the most absolute accuracy that which primâ facie creates a sufficient ground for the privilege claimed, and it lies upon the plaintiff to get rid of the effect of this statement by falsifying it, by which I do not mean that he must necessarily shew that it is wilfully untrue, but he must establish by some

(1) (1882) 10 Q. B. D. 191.

means other than by a conflicting affidavit that the defendants' affidavit is incorrect. In order that the plaintiff may succeed in doing so, the Court must be satisfied with reasonable certainty either from the defendants' own statements that they have erroneously represented or misconceived the nature of the documents, as was held to have been the case in *Attorney-General* v. *Emerson* (1), or from some source other than by affidavit that the defendants' affidavit is incorrect. In this case, instead of being of opinion that the plaintiff has succeeded in falsifying the statements of the defendants' affidavit, I think he has wholly failed to do so.

A. L. Smith L.J.

CHITTY L.J. The general rule with regard to discovery is that the person who seeks it is bound by the oath of the person from whom it is sought. There are a few exceptions by which the strictness of that rule has been to some extent modified. The exception material to the present case is that which was stated by the judges in *Attorney-General* v. *Emerson* (1) to arise when the Court is reasonably satisfied upon the statement of the party from whom discovery is sought that he has erroneously represented or misconceived the nature of the documents in question. This action is brought on two grounds, one being fraud, and the other innocent misrepresentation. The statement complained of is that there were 12,500 annual subscribers to the company. The defendants mention in their schedule of documents 12,500 applications by persons wishing to become subscribers, and they object to allow inspection of those applications on the ground that they form part of the evidence in support of the defendants' case, and do not support or tend to support the plaintiff's case, and contain nothing impeaching the defendants' case. That is the proper affidavit to make in support of the claim of privilege. The only ground upon which we are asked to say that there has been a misrepresentation or misconception of the nature of the documents is the description given of the documents themselves. But I cannot find in that any ground for saying that there has been a misrepresentation or misconception of their nature. All that

(1) 10 Q. B. D. 191.

C. A. 1897

FRANKENSTEIN v. GAVIN'S CYCLE CLEANING AND INSURANCE COMPANY.

is said is that they are applications by persons wishing to become annual subscribers to the company. In my opinion the statements of the affidavit form a complete ground for the privilege claimed, and there is no reason whatever for looking behind them. I therefore think that the order of the learned judge was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Bentwitch, Watkin Williams & Co.*
Solicitor for defendants: *T. Wilkinson.*

E. L.

C. A. 1897 *May* 19.

[IN THE COURT OF APPEAL.]

SOUTHPORT TRAMWAYS COMPANY *v.* GANDY.

Practice—Special Indorsement on Writ—Recovery of Land and Mesne Profits—Time to which Mesne Profits can be given—Order III., *r.* 6—*Order* XIV., *r.* 1—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 214.

The plaintiffs issued a writ indorsed with a claim for possession of hereditaments at S., of which particulars were given, with a statement that the defendant had been tenant to the plaintiffs, and that his tenancy had expired by notice on a given day, and the plaintiffs claimed "possession and 80*l.* for mesne profits." They then applied under Order XIV., r. 1, for liberty to sign final judgment for possession and the 80*l.* claimed for mesne profits. By affidavit in support of the application, the 80*l.* was claimed as double value for six months on account of the defendant having refused to deliver up possession. On the hearing of the application Kennedy J. gave liberty to the plaintiffs to sign final judgment for possession, "and for mesne profits to be calculated up to the date of the plaintiffs obtaining possession":—

Held, on appeal, that this order was right, for that, whether double value could be recovered or not, the writ was not vitiated by the plaintiffs claiming it by affidavit, and that the judge was not confined to giving mesne profits up to the time of the order, and was not bound to put the plaintiffs to a second action to recover mesne profits between the time of judgment and the time of recovering possession.

ACTION for the possession of land and mesne profits.

The writ was indorsed with a claim for possession of hereditaments at Southport, and with particulars which described

the property, and stated that the defendant had been tenant to the plaintiffs, and that his tenancy expired by notice on March 23, 1897. The indorsement concluded with, "The plaintiffs claim possession and 80*l.* mesne profits."

On April 7, 1897, the plaintiffs took out a summons under Order XIV., r. 1, for the defendant to shew cause why the plaintiffs should not be at liberty to sign final judgment for possession, and for the sum of 80*l.* claimed in the writ for mesne profits, and for costs to be allowed or taxed.

The secretary of the plaintiff company, in support of this summons, filed an affidavit, in which he said: "The plaintiff company claim from the defendant the sum of 80*l.* for mesne profits in respect of the said hereditaments and premises in consequence of the said defendant having refused to quit and deliver up possession of the same, such sum being six months' rent thereof at double value from the said 23rd day of March, 1897."

The defendant had written a letter stating that he should not give up possession, and that possession was nine points of the law, and by his affidavit stated objections to the validity of the notice to quit, and that he was advised and believed that he had a good defence on the merits.

On April 23, 1897, Kennedy J. gave liberty to the plaintiffs to sign final judgment for possession of the premises, "and for mesne profits to be calculated up to the date of the plaintiffs obtaining possession." Leave to appeal was given.

The defendant accordingly gave notice of appeal that the order might be set aside, or, in the alternative, that so much of it as related to mesne profits might be set aside on the grounds (1.) that the writ was not specially indorsed pursuant to Order III., r. 6, and (2.) that the affidavit in support of application for judgment under Order XIV. did not and could not allege that the specific sum claimed by the writ was justly due and owing at the date of the issue of the writ, because it was not due nor ascertained; and that the defendant might have unconditional leave to defend.

The question as to the notice to quit does not call for a report.

C. A. 1897

SOUTHPORT TRAMWAYS COMPANY v. GANDY.

Scrutton, for the appeal. The plaintiff is attempting to ride round the statute 4 Geo. 2, c. 28, s. 1, which gives double value against a tenant holding over, and expressly declares it to be a penalty. Now, Order III., r. 6 (*c*), does not allow a writ to be specially indorsed for the recovery of a penalty, and the affidavit shews that the plaintiff was seeking to recover double value. Order XIV., r. 1 (*b*), shews the course which the judge ought to have taken. Instead of this, he treated the writ as claiming mesne profits, and gave them to a time beyond that to which he was authorized to give them. By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214, the jury on the trial of an ejectment may give a verdict for mesne profits down to the time of the verdict, or to some preceding day to be specified therein, and judgment may be given for that amount: "Provided always that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." A second action is therefore necessary to recover mesne profits after verdict. But here the plaintiff by his affidavit shews that what he claims is possession of the land and a penalty which is not proper matter for a specially indorsed writ.

Shepherd Little, for the plaintiff. Order III., r. 6, consists of two portions. Down to (*e*) only liquidated demands are dealt with; then (*f*) deals with unliquidated damages in the way of mesne profits. No special indorsement for recovery of land and mesne profits is given in the General Orders; but a form of claim for possession of land and mesne profits is given in Appendix C, s. 7, and that form was followed here. The proviso in the section of the Common Law Procedure Act which has been referred to shews that under the old practice an action would lie for recovery of mesne profits after verdict, and now the judge, having jurisdiction to make an order for the recovery of land and mesne profits, can give mesne profits up to such time as may be just, and is not bound to put the plaintiff to a second action.

Scrutton, in reply.

LOPES L.J. In my opinion the order appealed from is perfectly good. The first objection taken to it is that the writ is not a specially indorsed writ so as to bring it within Order XIV. I have not the slightest doubt that it is a perfectly good writ for the recovery of the land and mesne profits. [The Lord Justice read the indorsement.] That is perfectly correct. The plaintiffs might have put in a claim for any amount they thought fit for mesne profits. They might have said 10,000*l.*, and that would not have affected the goodness of the writ. It is said that the plaintiffs have filed an affidavit from which it appears that their claim was not made for mesne profits, but for double value for holding over, and therefore was a claim for a penalty, and so not within Order III., r. 6; but that affidavit in no way invalidates the writ, and the order which the learned judge has made is perfectly within the terms of the writ, being an order for possession and mesne profits up to the time of the plaintiffs obtaining possession. Then it is urged that he had no jurisdiction to give mesne profits up to that time, and that he could only give them up to the date of his order. But the defendant had written a letter to say that he would not go out of possession, and that possession was nine points of the law. The learned judge saw that it was impossible to tell when the defendant would give up possession, and that it would not be enough to give mesne profits only up to the time of the order. Under these circumstances the learned judge in my opinion was quite right in giving mesne profits up to the time of possession being obtained.

RIGBY L.J. I am of the same opinion. The only difficulty which I felt was owing to my want of knowledge of the practice in these cases: I did not know whether it was not incumbent on the plaintiffs to state in the writ the amount they were prepared to stand by. But it was admitted that there was no rule or practice to that effect, and I take it that the naming an exaggerated amount will not make the writ bad. The writ, then, is perfectly good. I give no opinion upon the question whether double value for six months might have been recovered in this form of proceeding: it was not claimed by the writ, and

C. A. 1897

SOUTHPORT TRAMWAYS COMPANY v. GANDY.

Rigby L.J.

therefore does not come in question. In these days no judge is bound to go back and trace out the origin of his jurisdiction. He finds that he has jurisdiction to make an order for recovery of the land and payment of mesne profits, and he was quite right in making an order giving mesne profits till the time when the plaintiffs obtain possession. It would have been wrong to drive the plaintiffs to bring a second action. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *F. A. Rudall.*
Solicitors for respondents: *Rowcliffes, Rawle & Co.*

H. C. J.

1897
May 10, 11.

FIRTH *v.* STAINES.

Metropolis—Management Acts—Committee—Approval of acts of by Vestry—Ratification—Act made Criminal by Relation—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 58.

By s. 58 of the Metropolis Management Act, 1855, "It shall be lawful for . . . . any (metropolitan) vestry to appoint a committee . . . . for any purposes which in the discretion of the . . . . vestry would be better regulated and managed by means of such committee . . . . Provided always that the acts of every such committee shall be submitted to the general body of the . . . . vestry appointing such committee for their approval." A committee, appointed by a metropolitan vestry under this section for the purpose (inter alia) of executing the Metropolis Management Acts, so far as they related to the public health of the parish, being informed by the sanitary inspector that a nuisance existed upon certain premises endangering the health of the inhabitants, directed the inspector to serve notice upon the owner of the premises under the said Acts requiring him to abate the nuisance, and in default to take proceedings. The inspector, in pursuance of such direction, served the required notice, and, upon the owner failing to comply with it, laid an information against him for penalties under the said Acts, and a summons was issued. After the issue of the summons and before the hearing of the information, the vestry by resolution approved the acts of the committee in causing the notice to be served and the information to be laid:—

Held, that the approval of the vestry, although given after the service of the notice and the issue of the summons, was sufficient, and that the owner was liable to be convicted.

CASE stated by a metropolitan police magistrate.

The appellant is a sanitary inspector in the employment of

1897

FIRTH v. STAINES.

the vestry of St. Leonard, Shoreditch. The vestry had, under the powers conferred by s. 58 (1) of the Metropolis Management Act, 1855, appointed a committee, known as the Public Health Committee, and had empowered and authorized such committee "to execute and carry out the powers and duties of the vestry under (amongst other Acts) the Metropolis Management Acts, and other Acts amending the same from time to time, so far as they relate to the public health of the parish." On September 19, 1896, a written intimation, as provided by s. 3 of the Public Health (London) Act, 1891, of the existence of a nuisance upon certain premises situate at Nos. 91 and 93, Whiston Street, in the said parish, was served by the appellant upon the respondent as the owner and occupier of the said premises. On October 15 the appellant attended before a meeting of the Public Health Committee and made a report on the condition of the said premises, and at the same meeting the committee passed a resolution, "That notice be served upon the owner to abate the nuisance. Failing compliance, the inspector to take proceedings." On October 19 the appellant, in obedience to the said resolution, served upon the respondent a notice, under s. 85 of the Metropolis Management Act, 1855, that the drains passing through the premises were untrapped and unventilated, and in direct communication

(1) By s. 58 of the Metropolis Management Act, 1855, "It shall be lawful for any" (metropolitan) "vestry to appoint a committee . . . . for any purposes which in the discretion of the . . . . vestry would be better regulated and managed by means of such committee, and at any meeting to continue alter or discontinue such committee: Provided always that the acts of such committee shall be submitted to the general body of the . . . . vestry appointing such committee for their approval."

By s. 82, "It shall be lawful for any such vestry . . . . or for their surveyor or inspector or such other person as they appoint to inspect any drain, &c."

By s. 85, "If upon such inspection as aforesaid any drain . . . . appear to be in bad order and condition or to require cleansing alteration or amendment . . . . the vestry . . . . shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made requiring him forthwith or within such reasonable time as shall be specified in such notice to do the necessary works; and if such notice be not complied with by the person to whom it is given the vestry . . . . may if they think fit execute such works and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises."

1897

FIRTH v. STAINES.

with the public sewer, and requiring him, within seven days, to intercept the sewer gases from the house drains and provide proper ventilation. On November 3 the requisitions of the said notice had not been complied with, and the appellant accordingly took out a summons against the respondent for penalties under s. 64 (1) of the Metropolis Management Act, 1862. On the same day, after the issue of the summons, the above-mentioned proceedings and the resolution of the committee were reported to the vestry, and were approved by resolution entered in the minutes of the vestry. At the hearing of the summons the magistrate was of opinion that as the resolution of the committee had not been submitted to the vestry for their approval before the service of the notice the notice was invalid, and he accordingly dismissed the summons, subject to a case for the opinion of the Court.

A. Cripps, *Q.C.*, and *R. Cunningham Glen*, for the appellant. The whole object of the appointment of the committee would be gone if they could do no act without first obtaining the vestry's approval. The proviso in s. 58, that the acts of the committee shall be submitted to the vestry for their approval, is directory only; the approval of the vestry is not a condition of the validity of the committee's acts. But even if it is a condition of their validity, a subsequent approval is enough; it relates back to the time when the acts were done. There is nothing in the statute to require the approval to be given before the acts are done. The abatement of nuisances is a matter which has to be dealt with speedily, and there is often no time to communicate with the vestry before serving the abatement notice.

R. D. Muir, for the respondent. The resolution of the committee ought to have been approved by the vestry before the

(1) By s. 64 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), after reciting s. 85 of the former Act, it is provided that "in case of any such neglect or default by any person .... to comply with the order of any vestry .... to execute any works .... under any of the said provisions, the person .... so offending shall forfeit and pay to the vestry .... a sum not exceeding 5*l.* and also a further sum not exceeding 40*s.* for every day during which such offence shall continue."

notice was issued under s. 85. The committee cannot initiate proceedings; they can only manage them where specially authorized by the vestry. In *Barnsley Local Board* v. *Sedgwick* (1) this question was left open. But the whole argument there proceeded upon the assumption that if the notices had been sent out by the committee instead of by the board they would have been bad. To the general rule, that ratification relates back to the time when the act ratified was done, there is an exception where the effect of the ratification would be to make a third party a criminal. Here the notice served by the order of the committee was of no validity at the time when the respondent neglected to obey it, and his neglect was consequently no offence.

Cripps, Q.C., in reply.

HAWKINS J. In this case the magistrate dismissed the summons upon the ground that, as the resolution of the committee that notice should be served upon the respondent requiring him to abate the nuisance had not been submitted to the vestry for their approval before service of the notice, the notice was invalid. The question is whether he was right in that view. That turns upon s. 58, which provides that "It shall be lawful for . . . . any vestry . . . . to appoint a committee . . . . for any purposes which in the discretion of the . . . . vestry would be better regulated and managed by means of such committee. . . . Provided always that the acts of every such committee shall be submitted to the general body of the . . . . vestry appointing such committee for their approval." Under the power conferred by that section the vestry of St. Leonard, Shoreditch, appointed a committee, called the Public Health Committee, to execute and carry out the powers of the vestry under, amongst other Acts, the Metropolis Management Acts, so far as they related to the public health of the parish. Amongst the provisions of those Acts relating to public health are ss. 82, 85 of the Metropolis Management Act, 1855. The former of those empowers the vestry to inspect drains, and for that purpose to enter upon the premises after

(1) (1867) L. R. 2 Q. B. 185.

1897

FIRTH v. STAINES.

Hawkins J.

giving twenty-four hours' notice to the occupier of their intention to do so. And s. 85 says that if on such inspection any drain appears to be in bad condition, the vestry shall cause notice in writing to be given to the owner or occupier requiring him to do the necessary works within a reasonable time. The execution of the powers of those sections were plainly within the purposes for which the committee was appointed. And in the execution of those powers the committee, to whom the insanitary condition of the respondent's drains had been reported by the appellant, the sanitary inspector of the vestry, on October 15, 1896, passed a resolution, "That notice be served upon the owner to abate the nuisance. Failing compliance, the inspector to take proceedings." Upon October 19 the appellant, in obedience to that resolution, served a notice upon the respondent as owner of the premises, requiring him to intercept the sewer gases from the house drains and do the other necessary works. On November 3 the appellant took out a summons against the respondent for penalties for non-compliance with the terms of the notice; and on the same day the resolution of the committee and the issue of the summons were reported to the vestry and approved by them. It is said that the matter ought to have been submitted to the judicial consideration of the vestry before service of the notice on the respondent, and that their subsequent approval was insufficient to make the notice a good one. With that contention I cannot agree. The committee are appointed for "purposes which in the discretion of the vestry would be better regulated and managed by means of such committee." But if at each step in the execution of their powers the committee are first to obtain the sanction of the vestry, the whole object of their appointment is lost, and the section under which they are appointed might just as well be omitted from the Act. Under such conditions the committee could be of no possible use. Moreover, what the vestry are, under the proviso, required to approve is the "acts" of the committee; and until the committee have acted there is nothing for the vestry to approve. What I think the proviso means is that, if the committee are called upon to justify their acts, they will be unable to do so unless they shew an approval

1897

FIRTH v. STAINES.

of the vestry given at some time or other. The appeal must be allowed.

WRIGHT J. The question in this case is one of great and general importance, for although it does not now affect as it formerly did bodies acting under the general Public Health Act, the provision in the Act of 1848 requiring the approval by the board of the acts of its committees not being re-enacted in the Act of 1875, it affects metropolitan vestries acting under the Metropolis Management Acts, and also all municipal corporations, there being a similar proviso in the Municipal Corporations Act (45 & 46 Vict. c. 50, s. 22, sub-s. 2). It also affects county councils (51 & 52 Vict. c. 41, ss. 75, 82, sub-s. 2) and parish and district councils (56 & 57 Vict. c. 73, s. 56, sub-s. 1). The question, which is one of undoubted difficulty, was left undecided by Blackburn J. in *Barnsley Local Board* v. *Sedgwick*. (1) We have now to decide it; and although we are only asked to say whether the notice was bad by reason of the vestry's approval not having been given till after its issue, the principle of our decision must equally apply to the summons. I think the case must be decided upon the ordinary principles of the doctrine of ratification. To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself. I think that all those conditions were satisfied here. Therefore, upon the approval of the vestry being given, the acts of the committee became valid as from the time when they were done.

Appeal allowed.

Solicitor for appellant: *H. M. Robinson.*
Solicitor for respondent: *Jutsum.*

(1) L. R. 2 Q. B. 185.

J. F. C.

1897
May 24.

THE VESTRY OF THE PARISH OF FULHAM, Appellants *v.* THE LONDON COUNTY COUNCIL, Respondents.

Metropolis—Public Health—Sewer—Nuisance—Jurisdiction of Justices—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 2, *sub-s.* 1 (*b*).

By the Public Health (London) Act, 1891, s. 2, sub-s. 1 (*b*), for the purposes of the Act, any watercourse or drain, so foul, or in such a state, as to be a nuisance or injurious or dangerous to health, is a nuisance liable to be dealt with summarily under the Act:—

Held, that this provision does not apply to public sewers, and therefore justices have no jurisdiction to make a summary order on the London County Council in respect of a main sewer, vested in the council, and forming part of the main drainage system of London.

Case stated by justices.

The clerk to the respondents, the London County Council, owners of the sewer at the junction of Hartismere Road and Dawes Road, was summoned to answer the complaint, made by the sanitary inspector to the appellants, the vestry of the parish of Fulham, that at the premises above mentioned the following nuisance existed: foul smells emitted from the surface sewer ventilator in the roadway in such quantity as to be a nuisance and dangerous to health, and that the nuisance was caused by the act, default, or sufferance of the respondents, the owners.

The summons was issued in consequence of a complaint under s. 5, sub-s. 1, of the Public Health (London) Act, 1891. (1)

Upon the complaint coming on for hearing the justices interposed during the opening, and inquired how the matter came

(1) 54 & 55 Vict. c. 76. By s. 5, sub-s. 1, "If . . . . the person on whom a notice has been served . . . . makes default in complying with any of the requisitions thereof within the time specified . . . . the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order)." The section goes on to define the different kinds of nuisance orders which may be made.

within s. 2 of the Act, and it was contended on behalf of the appellants that the sewer was a watercourse or drain within sub-s. 1 (*b*) (1), and in support of this contention the case of *St. Helen's Chemical Co.* v. *Corporation of St. Helen's* (2) was cited.

On behalf of the respondents their counsel cited the case of *Reg.* v. *Parlby* (3), and contended that a main sewer in the metropolis was not a drain within the meaning of s. 2, sub-s. 1 (*b*), (1) and that the matter was not a nuisance in respect of which summary proceedings could be taken under the Act.

The justices agreed with the respondents' contentions, and determined that a public sewer was not within the definition of nuisances to be dealt with under the Act; but they allowed the appellants to call the sanitary inspector, who proved service of notices, and that the notice requiring abatement of the nuisance had not been complied with, and gave evidence of smells emitted from the ventilator, and that the respondents were the owners. In cross-examination he admitted that the sewer was a main sewer forming part of the main drainage system of London.

The justices thereupon dismissed the case, on the ground that the nuisance complained of was not one coming within the Public Health (London) Act, 1891, and that they had no jurisdiction to deal with the matter of the complaint.

The question for the opinion of the Court was, whether the justices were right in law in their decision, or whether they should have heard and determined the case.

Danckwerts, for the vestry of Fulham, in support of the appeal. The justices were wrong in holding that they had no jurisdiction, and they ought to have heard and determined the case, and made an order against the county council under s. 5 of the Public Health (London) Act, 1891. The sewer referred

(1) 54 & 55 Vict. c. 76, s. 2:—
"(1.) For the purposes of this Act . . .
"(*b*) Any pool, ditch, gutter, watercourse, cistern, water-closet, earth closet, privy, urinal, cesspool, drain, dung-pit, or ash-pit, so foul or in such a state as to be a nuisance or injurious or dangerous to health . . . . shall be nuisances liable to be dealt with summarily under this Act."

(2) (1876) 1 Ex. D. 196.

(3) (1889) 22 Q. B. D. 520.

1897

FULHAM VESTRY v. LONDON COUNTY COUNCIL.

to in the case is a watercourse or drain, and therefore the nuisance complained of came within s. 2, sub-s. 1 (*b*). The decision in *Reg.* v. *Parlby* (1), which the justices followed, is distinguishable, because that case turned on the Public Health Act, 1875 (38 & 39 Vict. c. 55), which by s. 4 defines "sewer," whereas in the Public Health (London) Act, 1891, there is no definition: see the definition clause, s. 141. In the Nuisances Removal Act, 1855 (2), on which *St. Helen's Chemical Co.* v. *Corporation of St. Helen's* (3) was decided, there was also no definition, and that case therefore ought to govern the present, rather than *Reg.* v. *Parlby*. (1)

Bosanquet, Q.C. (*Avory* with him), for the respondents, the London County Council. The decision of the justices was right. The scheme of legislation is that the Public Health (London) Act, 1891, is to do for London what the Public Health Act, 1875, does for country districts, and in certain instances the Act of 1891 takes the place of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), but excepts the provisions of that Act as to drains or sewers: see Sched. IV. to the Act of 1891. It is clear from the decision in *Reg.* v. *Parlby* (1) that, in cases arising outside London, justices have no jurisdiction to make orders such as that asked for in the present case with regard to public sewers, and it would be an inconsistent construction to hold that the law was different in cases arising in London.

Danckwerts replied.

DAY J. I am clearly of opinion that this appeal should be dismissed, upon the ground that the magistrates were right in declining jurisdiction. To my mind 54 & 55 Vict. c. 76, s. 2, sub-s. 1 (*b*), does not apply to nuisances arising from defects in the sewers of London, which are vested in the county council. The words used are particularly applicable to nuisances arising from what I may call private sources. What are contemplated are nuisances arising from the acts of owners of property, as

(1) 22 Q. B. D. 520.
(2) 18 & 19 Vict. c. 121, repealed by 38 & 39 Vict. c. 55, s. 343, and 54 & 55 Vict. c. 76, s. 142.
(3) 1 Ex. D. 196.

distinguished from anything which may be caused by the construction of great public works, which are entrusted to the county council. If the county council have made mistakes with reference to the ventilation of sewers in this particular district, the remedy in favour of the public is, among other ways, by information, and the question would come on to be tried by the usual constitutional tribunal; but it is not a question to be delegated to magistrates sitting at petty sessions. The county council are entitled to have their questions tried by a jury in the regular way, and that is the only tribunal which is competent to overrule their decision. That is the only tribunal that I am aware of that can determine these questions. It is intended that the county council should be responsible to the public generally for the discharge of their duties; they are not responsible to the magistrates in petty sessions. That is my opinion of what is contemplated by the Legislature. The appeal will be dismissed.

LAWRANCE J. I am of the same opinion. I think that the provisions of the Act in question were intended to apply to private matters—that is, to acts done by owners or occupiers of property—and that in order to make them applicable to such public works as are referred to in the present case, it would be necessary to read into s. 2, sub-s. 1 (*b*), the word "sewer," which most probably was purposely omitted in order to shew that the Act has no reference to public sewers.

Judgment for the respondents.

Solicitor for appellants: *T. Blanco White.*
Solicitor for respondents: *W. A. Blaxland.*

P. B. H.

1897
April 6, 29.

In re RAATZ.
Ex parte RAATZ.

Bankruptcy—Petitioning Creditor's Debt—Bill of Exchange given for Amount of Debt—Determination of Credit by act of Bankruptcy.

A petition in bankruptcy alleged as the petitioning creditor's debt a sum due for goods sold and delivered. Previously to the commission of the alleged act of bankruptcy, the debtor had given to the petitioning creditor bills of exchange for the price of the goods, which bills had not matured at the date of the presentation of the petition :—

Held, that the only effect of taking the bills was to give the debtor a period of credit, that by the act of bankruptcy the period of credit was determined, and that the petitioning creditor's debt was correctly stated in the petition.

APPEAL from the county court of Glamorganshire.

On January 8, 1897, a petition was presented by Jules Rolez & Co. for a receiving order against the debtor. The petition alleged that the debtor "is justly and truly indebted to us in the sum of 111*l.* for goods sold and delivered by us to him on May 23, 1896, and July 24, 1896"; and the act of bankruptcy alleged was an assignment for the benefit of creditors made on November 17, 1896.

The debtor had purchased the goods in question from Rolez & Co., and previously to the commission of the said act of bankruptcy had given to Raatz & Co. two bills of exchange for the price of the goods, one of the bills for 85*l.* 15*s.* 6*d.* being expressed to be due on January 27, 1897, and the other for 25*l.* 4*s.* 6*d.* on February 18, 1897. At the hearing of the application for a receiving order the debtor disputed the existence of the debt stated in the petition on the ground that the bills which had been given for the price had not yet matured. The registrar overruled the objection and made the receiving order.

The debtor appealed.

Meager, for the debtor. The giving of the bills was a conditional payment of the debt, and so long as they are still current the creditors cannot rely on the original debt in respect

of which they were given: *Ex parte Matthew.* (1) Sect. 6, sub-s. 1 (*b*), of the Bankruptcy Act requires that the petitioning creditor's debt shall be "a liquidated sum payable either immediately or at some certain future time." But the debt here stated is neither; it is only payable on the contingency of the dishonour of the bills.

Muir Mackenzie, for the petitioning creditors. The case of *Ex parte Matthew* (1) is not in point. There the question was whether the non-payment of a debt for which bills had been taken by the creditor could be relied on as an act of bankruptcy. For the purposes of a bankruptcy petition, where bills have been given for goods sold, the real debt is the original debt which formed the consideration for the bills. In *Ex parte Griffiths* (2) it was held that a bond debt on which a judgment had been recovered was not merged in the judgment for the purposes of bankruptcy, although it was so for other purposes. That case was followed in *In re King and Beesley.* (3) The principle of those decisions applies equally to a bill of exchange.

[VAUGHAN WILLIAMS J. Those cases are not in point. They are authorities only on the law of merger. The taking of a bill does not effect a merger; it only gives an extended credit.]

The commission of the act of bankruptcy by executing the deed of assignment determined the credit given by the bills.

Meager, in reply.

VAUGHAN WILLIAMS J. In our opinion the decision of the registrar ought to be affirmed. Two objections have been taken to that decision. First, it was argued that although the bills of exchange were produced at the hearing, there was no proof that the petitioning creditors were the holders of the bills at the time of the presentation of the petition, and that if they were not the holders their debt in respect of which the bills were given was pro tanto paid. It is true that the affidavit does not in terms say that the petitioning creditors are the holders of the bills, but the bills were produced by them, and in the affidavit they swear to the existence of the original debt,

(1) (1884) 12 Q. B. D. 506. (2) (1853) 3 D. M. & G. 174.
(3) [1895] 1 Q. B. 189.

1897

In re RAATZ.
Ex parte RAATZ.

Vaughan Williams J.

which would be untrue if the bills were not in their hands. I may say that I do not think the petition is in proper form: it ought to have mentioned the bills; and if any suggestion had been made that the petitioning creditors were not the holders of the bills, I should have given the debtor the opportunity of proving that fact. But that it was the fact was not suggested. Then, secondly, it was said that even if the petitioning creditors were the holders of the bills, the fact that the bills had not matured at the time of presenting the petition prevented them from relying on the original debt. In that contention I do not agree. Sect. 6, sub-s. 1 (*b*), requires that the debt shall be "a liquidated sum payable either immediately or at some certain future time." And it was objected that the cause of action on the original debt was suspended during the currency of the bills, and that the original debt only became payable on a contingency in the event of the dishonour of the bills. But in my view the subsequent act of bankruptcy put an end to that suspension, and determined the period of credit which, according to the law merchant, was given by the taking of the bills. The principle which has enabled courts to decide that goods may be stopped in transitu in the event of the purchaser's insolvency, notwithstanding that he may have given bills for the price, seems to me to equally apply to the case of a bankruptcy petition. And I think that the fact of bills being given for the price of goods purchased and not being yet matured does not, in the event of an act of bankruptcy supervening, prevent the price from being a debt payable immediately within the meaning of s. 6, sub-s. 1 (*b*).

WRIGHT J. I am of the same opinion. I think that where a creditor holds a debtor's acceptance for the price of goods sold, and the debtor commits an act of bankruptcy, the creditor is entitled to treat the bill as dishonoured because the act of bankruptcy puts it in the power of the other creditors to force on dishonour of the bill.

Appeal dismissed.

Solicitor for debtor: *R. White, for J. Ivor Evans, Swansea.*
Solicitor for petitioning creditors: *A. J. Benjamin.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1897

April 29; *May* 1.

AKTIESELKAB HELIOS *v.* EKMAN & CO.

Ship—Charterparty—Discharge of Timber Cargo—Custom—Inconsistency with Contract—"To be taken from alongside at Merchants' Expense."

A custom that, in discharging long lengths of timber from a ship, the shipowner is bound to put the timber into lighters brought alongside by the consignees is not inconsistent with a charterparty which provides that the timber shall be taken from alongside at merchants' expense.

APPEAL from the judgment of Collins J. in an action tried before him without a jury.

The action was by shipowners against charterers for six days' demurrage under a charterparty.

By the charterparty it was agreed between the plaintiffs and the defendants, that the plaintiffs' ship *Helios* should load at Ramvik a cargo of deal and/or batten and/or board-ends firewood, which was to be "brought to and taken from alongside the ship at merchants' risk and expense," and therewith proceed to one of the usual wood docks in the River Thames as ordered on arrival at Gravesend. The charterparty allowed sixteen running days (Sundays and holidays excepted) for loading the ship at the port of loading, and the like days for discharging her at the port of delivery, and ten days on demurrage over and above the said laying days at 8*l.* per day. A cargo having been loaded in pursuance of the charterparty, the ship sailed from Ramvik, and, on reaching Gravesend, was ordered to proceed to the Regent's Canal Dock. She arrived in the dock on Friday, November 13, 1896, and was in berth and ready to discharge on the evening of that day. On the next day no barges came alongside to receive the cargo. On the following Monday barges sent by consignees of cargo were brought alongside, but the captain refused to begin discharging, because there were no men on the barges to receive the timber and stow it in the barge. The defendants asserted that, by the custom of the port of London, in the case of a ship discharging timber in that port the obligation lay upon the shipowner of stowing

C. A. 1897

AKTIESELKAB HELIOS v. EKMAN & Co.

long lengths of timber, of which the cargo in question was partly composed, in the lighters brought alongside by the consignees for the purpose of receiving the cargo. The consignees ultimately sent men to receive and stow the timber in the barges. The unloading of the ship was not completed until December 8. The learned judge found upon the evidence that there was a custom in the port of London by which, in the case of a ship discharging long lengths of timber, the shipowner was bound to put the timber into lighters in such a way and to such an extent that the lighters might fairly be deemed to be loaded; but he held it unnecessary for the purposes of the case to decide whether the obligation imposed by the custom upon the shipowner extended to stowing the timber in the barge in the sense of arranging it so that the barge might be conveniently navigated and would be loaded to her full capacity. He held that the custom as found by him was not inconsistent with the charterparty, and he found that the delay in unloading the ship had been occasioned by the refusal of the captain to perform the obligation imposed upon him by the custom of putting the timber into the barges. He therefore gave judgment for the defendants.

Robson, Q.C., and *Carver*, for the plaintiffs. The action for demurrage is maintainable. The delay was caused by the default of the defendants in not having men in the barges to receive the cargo and stow it so that the barges might be properly loaded. The evidence does not support the finding of the learned judge as to the custom. Assuming however that it does, the custom as found by him is inconsistent with the term of the charterparty by which the cargo is to be taken from alongside at merchants' risk and expense. The custom that the defendants have all along contended for is that the shipowner is bound to stow the timber on board the barge. The learned judge no doubt did not find in terms that the custom imposed an obligation to stow on the shipowner, but he has found that the custom is that the shipowner should put the long lengths of timber into the barge in such a way and to such an extent that she may fairly be said to be loaded. But

the evidence shewed, and it is obvious, that the loading of the barge must involve some arrangement of the timber on the barge: she could not be loaded by dropping the timber into her pell-mell; and it is contended that a custom which imposes on the shipowner the obligation of doing anything to the timber beyond delivery, i.e., putting it clear of the ship and into the barge, is contrary to the term of the charterparty to the effect that it is to be taken from alongside at the merchants' expense. The defendants were by the charterparty to take the cargo from alongside. To do that in barges must involve some arrangement of the timber on the barge in the nature of stowage, and the defendants had no one to perform this operation. The defendants never claimed that the shipowners should put the cargo into the barges without stowing it. The matter in dispute between the parties which really occasioned the delay was whether the shipowners or the charterers were bound to stow the cargo on the barges.

It would have been useless to commence putting the timber into the barges when there was no one there for the consignees to stow it, for the stowing must necessarily be done as the timber is delivered into the barge. Consequently the delay was really wholly occasioned by the default of the defendants.

[They cited *Petersen* v. *Freebody & Co.* (1); *The Nifa* (2); *Holman* v. *Wade.* (3)]

Joseph Walton, Q.C., and *R. D. Isaacs*, for the defendants. According to the general law apart from custom all the shipowner is bound to do is to offer the cargo across the ship's rail, and the operation of delivering is a joint act to be performed by the shipowner and charterer or consignee. That was the effect of the decision in *Petersen* v. *Freebody & Co.* (1), in which case no custom was proved. The custom found in this case is in substance that the delivery is to be effected in the case of long lengths of timber by the shipowner putting the timber into the barge. It is not found, nor is it contended for the purposes of this case, that the shipowner is bound to stow the timber in the sense of arranging it in the barge so that it will hold as

(1) [1895] 2 Q. B. 294. (2) [1892] P. 411.
(3) *The Times*, May 11, 1877.

C. A. 1897

AKTIESELKAB HELIOS v. ERMAN & Co.

much as it possibly can, but merely that he is bound to put so much timber into the barge as will fairly load it. There is nothing in the custom as found by the judge inconsistent with the terms of the charter. It merely explains what is a good delivery alongside, leaving the obligation of the defendants to take from alongside untouched. The case of *The Nifa* (1) is not in point. There the alleged custom imposed upon the shipowner the obligation of carrying the cargo across a space between the ship and the quay, and therefore was held to be inconsistent with the term that the cargo was to be taken from alongside at merchants' expense. The judge found that the delay was altogether occasioned by the refusal of the captain to perform the duty imposed by the custom on the shipowners. The fact that the defendants may have made an excessive demand on the captain, namely, that he should stow the timber on the barges, could not exonerate the shipowners from the performance of their obligation to put the timber into the barges.

Robson, Q.C., in reply.

LORD ESHER M.R. In this case the plaintiffs have brought an action for demurrage under a charterparty. They allege that their ship was delayed at the port of discharge by reason of the default of the defendants in not having men in the barges alongside ready to take delivery of the cargo. It is for the plaintiffs to prove their case. If the written terms of the charterparty stood alone, it has been held, and I think rightly held, that, upon the true construction of a charterparty in those terms, the delivery of the cargo from the ship into barges or on to a quay is a joint operation, that is to say, neither party is bound to do it alone. It is to be a joint act, and, therefore, if one party is not there to perform his part in it, that prevents the other party from performing his part. Therefore, upon the written terms of the charterparty standing alone, the captain of the ship would not be bound to begin to deliver the cargo into the barges, unless the charterers had men there to assist in the joint operation; and, if they were not ready and willing to take part in it, the captain being ready and willing to do so, he

(1) [1892] P. 411.

would be prevented by the default of the charterers from discharging the ship, and demurrage would be payable for the consequent delay. That being the state of things with regard to a charterparty in these terms if they stood alone, a custom appears to have been evolved among the persons engaged in importing timber cargoes into the Thames by way of addition to the terms of the written contract. If that custom contradicts the express terms of the charterparty, then it is a bad custom so far as it is sought to apply it to a charterparty in such terms. But, if the custom is consistent with the terms of the charterparty, so that the two may fairly stand together, then the custom must be taken to be incorporated into the written contract, and the Court must construe that contract accordingly. In this case we have to consider whether a custom was proved, and if so, what it was, and whether such a custom was consistent with the terms of the charterparty in this case. The learned judge has found that, whereas without a custom both parties must take part in the operation of delivering the timber from the ship into the barges of the consignee, a custom was proved with regard to long lengths of timber by virtue of which both parties are not to take part in that operation, but the shipowner undertakes to perform it by himself without the aid of the other party. It is part of the operation of taking delivery of the cargo that the consignee or merchant should provide barges and bring them alongside in such a position that the timber can be delivered from the ship into the barge. The barges used were what are called "dumb barges"—that is to say, barges which with the exception of two small cabins at the ends of the barge, one for stowing the tackle of the barge and the other for the use of the bargemen, are altogether undecked and open for the reception of the cargo. The barges were brought alongside the ship by the consignees. The custom found is, as I have said, that in the case of long lengths of timber the shipowner alone has to perform the operation of delivery into the barges, which, if there were no custom, would have to be performed by both parties together. That operation cannot be performed by one man, but requires at least two, and it may be three or four men, to perform it.

C. A. 1897

AKTIESELKAB HELIOS v. EKMAN & Co.

Lord Esher M.R.

The way in which the operation has to be performed is that the piece of timber must be passed endways out of the port-hole, which would be higher than the bottom of the barge, down into the barge, and there must be some one at the lower end of the piece of timber to move it round, so that the top end may come out of the port-hole and so be got clear of the ship and be let down into the barge. A sling is generally used for the purpose of gradually lowering that end of the piece of timber into the barge, and then it is easy to turn the other end, so that the whole piece of timber may go into the barge. It is obvious that it would be the natural and ordinary course of things to turn the piece of timber sufficiently to let it go pretty nearly lengthways into the barge, for, if the timber, as it came out of the port-hole, were put across the barge, opposite the port-hole, the port-hole would become blocked and other timber would be prevented from coming out. The whole of the cargo has to be delivered into the barges in that way, and the effect of the custom is that the process of delivering the timber into the barge, as I have described it, is not a joint operation, but a single operation to be performed by the shipowner alone. No doubt when timber is put into a barge without more care than is involved in merely putting it on board, the barge might be difficult to navigate, and she would not get so full a cargo as she would if the timber were properly stowed—that is, arranged in the barge after being put on board. What is the effect of the evidence as to the custom? The judge finds in plain terms, as to so much of the transaction as consists of delivery of the timber out of the ship into the barge, that it is to be wholly performed by the shipowner alone; but he does not find that the arranging of the timber when on the barge, so as to make the barge properly navigable, and to make the cargo of the barge as large as it can be, is to be done by the shipowner either alone or jointly with the charterer. In a case where there is no custom and the delivery is to be a joint operation, when the timber is delivered into the barge, arranging it so as to make the barge properly navigable and enable her to take as large a cargo as possible is not a part of the joint operation. When the joint operation of delivering the timber into the barge is

over, the shipowner would have nothing to do with the stowing of the timber on the barge, which must be done by the merchant in the barge. Here the judge has interpreted the charterparty according to the custom, and has held that, instead of being a joint operation, the delivery of the timber into the barge is an operation to be done by the shipowner only without the assistance of the consignee. I think the evidence supports his finding, and that the custom so found is a reasonable one.

Then the question is whether the custom so limited is contrary to the terms of the charterparty. I think not. It simply explains what delivery of the cargo to the consignee alongside is and how it is to be effected—namely, by the act of the shipowner alone instead of the joint act of both parties. I therefore think that the view taken by the learned judge was correct.

Then did the plaintiffs fail to perform the obligation which rested upon them under the custom? It was urged that the defendants claimed that the plaintiffs were not only bound to make delivery of the cargo as I have described, but were bound to stow it after it was in the barge. As I have said, I do not think they were so bound, and therefore the defendants required them to do what they were not bound to do. But that did not relieve the plaintiffs of the duty to do what they ought to have done. They were bound to put the cargo on board the barge; they neglected to do that, and, according to the finding of the learned judge, that neglect was the sole cause of the delay occasioned to the ship. That being so, I think the defendants were not liable for the demurrage claimed, and that this appeal must be dismissed. I can see nothing in any of the cases to which we have been referred that is inconsistent with what we are deciding in this case.

A. L. SMITH L.J. This is an action by shipowners against charterers for demurrage at the port of discharge. It is not disputed that the ship was delayed for six days beyond her lay-days, and the question is whose fault it was that she was so delayed. The shipowners say that it was the charterers' fault. The charterers on the other hand say that it was not their fault, because they sent lighters for the purpose of unloading the

C. A. 1897

AKTIESELKAB HELIOS v. EKMAN & Co.

A. L. Smith L.J.

ship, but the shipowners in breach of the charter refused to load them; and that, if the shipowners had performed their duty in accordance with the obligation imposed upon them by the charterparty coupled with the custom, there would have been no delay; and therefore that they cannot maintain the action for demurrage. The learned judge at the trial found upon the evidence that the whole of the delay was due to the refusal of the captain of the ship to put the timber into the barges as required by the custom: and I think the evidence supports that finding. Therefore, assuming the custom as found by the judge to be proved and to be applicable to this charterparty, the delay was due to the captain's default and not that of the defendants. The first question that arises is whether any and, if so, what custom was proved. The custom set up by the defendants in the first instance no doubt was that it was the duty of the owners of a ship bringing long lengths of timber into the port of London, not merely to unload them into the lighters provided by the consignees, but also to stow them when they were in the lighters. I think that they failed to prove a custom that the shipowner should stow the timber in the lighters, and the learned judge refused to find such a custom. He found that by the custom of the port of London in the case of long lengths of timber there is no delivery alongside under a charterparty like this until they have been placed by the shipowner into the lighters—not upon or across the lighters, but into them. It was contended that this custom was not proved. I think it was proved by several witnesses. It seems to me impossible upon the evidence to say that the learned judge was wrong in finding as he did as to this custom.

The next point taken was this. It was said that, even if such a custom exists, namely, a custom that long lengths of timber should be put by the crew of the ship into the barges, that custom contradicts the written term of the charterparty, which provides that the cargo is to be taken from alongside at merchants' risk and expense. I do not think that it does. The custom is merely to the effect that there is no right delivery from the ship's side till the long lengths of timber have been put into the barge. It is not sufficient as in the case of other

cargoes to sling the articles to be delivered over the ship's rail, which when lowered are received by the consignee below. A cargo of timber cannot be got out of the ship, unless there is somebody from the ship in the barge to take the long lengths of timber which have come out of the port-hole. There is no right delivery alongside until the timber is delivered by the ship's crew into the barge. This question of delivery has in this case been mixed up a good deal with the question of stowage, which is not wonderful, seeing that the defendants sought to prove a custom that the shipowner was bound to stow the timber in the barge. But, when rightly apprehended, the evidence shews that the stowage is something distinct from the putting of the timber into the barge from the ship. It was argued by the plaintiffs' counsel that the evidence shewed that the barge could not be properly loaded, unless the timber was stowed at the same time. But I cannot find that this is proved by the evidence. No doubt the best way of loading the barge would be for the consignee to have men to stow the timber as it is delivered—that is to say, put into the barge by the crew of the ship. But, if the consignee does not think fit to have men for that purpose, I do not see how that does away with the shipowner's duty to deliver the timber into the barge. For the reasons above I do not think that the custom as found by the learned judge contradicts the charterparty. This proved custom differentiates this case from *Petersen* v. *Freebody & Co.* (1) It simply shews that there is no right delivery of the timber until it is put by the shipowner into the barge. I agree that the appeal should be dismissed.

CHITTY L.J. There are substantially two questions upon this appeal: one with regard to the existence of a custom; the other whether the custom as found by the judge is inconsistent with the terms of the charterparty. It appears to have been alleged by the defendants that the custom in the case of ships discharging long lengths of timber in the port of London was that the shipowner was bound to stow the timber in the barges brought alongside by the receiver of cargo. The learned judge

(1) [1895] 2 Q. B. 294.

C. A. 1897

AKTIESELKAB HELIOS v. ERMAN & Co.

Chitty L.J.

however has not found the existence of a custom extending so far as that. He found that by the custom there was in the case of long lengths of timber an obligation on the part of the shipowner to discharge the timber into lighters. So far his finding does not appear to be objected to, and, having regard to the evidence, I think it is beyond dispute. But he goes on to say that the duty of the shipowner is to put the timber into the lighters "in such a way and to such an extent as that the lighters may fairly be deemed to be loaded;" and these words were fastened upon by the counsel for the plaintiffs to support the argument that the judge meant that the custom imposed upon the shipowner the duty of "stowing" the cargo on the barge in the ordinary sense of the term. But that that argument is ill-founded appears to me to be shewn by the judgment itself, because the learned judge expressly said that he did not mean that the "stowing" in that sense was to be done by the shipowner. I think what the judge meant by "fairly loaded" was this. The shipowner has to discharge into the lighter the timber which has been brought by the ship. His obligation would not be satisfied by putting two or three pieces of timber on board the barge. His obligation is to put a fair cargo on the barge. It is clear, of course, that a barge will not hold as much if the timber is not stowed—that is, arranged in the barge in a proper manner—as it would if the operation of stowage were performed. I do not think that the argument can be supported which attributes to the judge a meaning which I am satisfied, on reading his judgment, he did not mean to convey.

The next question is whether the custom as found by the judge can stand, having regard to the express terms of the charterparty. I agree with the view expressed by the Master of the Rolls and my brother A. L. Smith, and also by the learned judge at the trial, to the effect that the custom is not contrary to the terms of the charterparty, which provides that the cargo is to be taken from alongside at merchants' risk and expense. The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed, it is the duty

of the merchants, in accordance with the charterparty, to take from alongside the cargo thus delivered.

Another point was raised, though I think it was treated as a subordinate one. It was urged that the shipowners were excused from performance of their duty by the conduct of the charterers. There was however in my opinion no refusal by the charterers to allow the shipowners to discharge into the barges according to the custom. It was said that they demanded something more than what the custom required, namely, that the shipowners should stow the timber on the barges. But I do not think that by doing that they discharged the shipowners from performing the obligation which lay upon them. For these reasons I think the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Stokes & Stokes.*

Solicitors for defendants: *Kearsey, Hawes & Walsh.*

E. L.

[IN THE COURT OF APPEAL.]

UNIVERSO INSURANCE COMPANY OF MILAN *v.* MERCHANTS MARINE INSURANCE COMPANY, LIMITED.

Insurance, Marine—Liability of Broker for Premium—Custom—"Company's Policy."

The rule of law, founded on mercantile custom, by which the broker, and not the assured, is liable to the underwriter for the premium upon a policy of marine insurance, is not limited to the ordinary form of Lloyd's policy, but extends also to a "company's policy," which contains a promise by the assured to pay the premium.

APPEAL from the judgment of Collins J. at the trial before him without a jury.

The facts, which are more fully stated in the report of the case in the Court below (1), were briefly these.

The action was brought to recover 1361*l.* 17*s.* 6*d.* for

(1) [1897] 1 Q. B. 205.

C. A. 1897

UNIVERSO INSURANCE COMPANY OF MILAN v. MERCHANTS MARINE INSURANCE COMPANY.

premiums upon policies of marine insurance effected by the defendants with the plaintiffs. The policies in question were policies of re-insurance effected by the defendants with the plaintiffs through a firm of brokers. The material portion of one of the policies, which were not under seal, was as follows, the others being substantially in the same form: "Whereas it hath been proposed to the Universo Insurance Company by the Merchants Marine Insurance Company, Limited . . . . to make with the said company the insurance hereinafter mentioned and described, Now this policy witnesseth that, in consideration of the said person or persons effecting this policy promising to pay to the said company the sum of 37*l.* 10*s.* as a premium of and after the rate of 7*l.* 10*s.* per cent. for such insurance, the said company takes upon itself the burthen of such insurance to the amount of 500*l.*" The brokers through whom the policies had been effected had suspended payment and executed a deed of assignment to a trustee for the benefit of their creditors; and, the premiums on the policies not having been paid, the plaintiffs applied to the defendants for payment of them; but the defendants replied that they were liable for them to the trustee of the brokers, against whom they claimed a right of set-off.

Evidence was called at the trial on behalf of the defendants to prove a general custom among underwriters that the broker, and not the assured, was liable to the insurers for the premiums, and that the custom applied to insurances under policies in the form used by the plaintiffs, which was known as a "company's policy," insurances by companies being always substantially in the same form. The learned judge gave judgment for the defendants.

May 5. *Sir R. T. Reid*, *Q.C.*, and *Carver*, for the plaintiffs. The evidence did not prove a custom applicable to a policy such as those now in question. It really only proved the existence of the well-known custom applicable to a Lloyd's policy, the nature and origin of which were explained in *Power* v. *Butcher*. (1) In a Lloyd's policy the receipt of the premium

(1) (1829) 10 B. & C. 329.

from the assured is acknowledged, and, therefore, there is no contract by the assured to pay the premium to the underwriter, and the custom that he should look to the broker only for the premium is not inconsistent with the terms of the policy. The custom set up here is inconsistent with a policy which contains an express promise by the assured to pay the premium to the underwriter. It is submitted that, in the case of a policy such as those now in question, the underwriter could not sue the broker for the premium.

[They also cited *Xenos* v. *Wickham*. (1)]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. The custom is general and not applicable merely to a Lloyd's policy. It cannot be explained by reference to the acknowledgment of receipt of the premium contained in a Lloyd's policy. A recital in a contract not under seal is not an estoppel. It is like a receipt which, if given by mistake, may be contradicted. The form of a Lloyd's policy did not create the custom: it merely recognises it. The evidence in the present case clearly shewed that the application of the custom is not limited to the case of a Lloyd's policy. The custom is no more inconsistent with the terms of this policy than with those of a Lloyd's policy. It simply shews how payment of the premium by the assured is to be made.

Sir R. T. Reid, Q.C., in reply.

Cur. adv. vult.

May 27. LORD ESHER M.R. In this case the plaintiffs sue for premiums upon policies of marine insurance effected by the defendants with the plaintiffs, which policies were in a form that is not unusual. This case has never presented any difficulty to my mind. The plaintiffs appear to me to be attempting to upset a course of business which has existed for a hundred years or more without any possible ground. The custom, which has been proved in court so often that the courts take judicial notice of it, is that the underwriter does not look to the assured for payment of the premium, but to the broker who effected the policy between the two; that is to say that, having

(1) (1863) 14 C. B. (N.S.) 435.

C. A. 1897

UNIVERSO INSURANCE COMPANY OF MILAN v. MERCHANTS MARINE INSURANCE COMPANY.

Lord Esher M. R.

agreed with the assured for payment of the premium, the underwriter agrees to take the credit of the broker instead of the assured. It has never been supposed hitherto that that course of dealing is in contradiction of the terms of the policy. It is not a contradiction of the terms of the policy, but a mode of carrying them out. The policy says that the assured is to pay the premium, but the mode in which the payment is to be made is according to the custom. It is the universal understanding in the business of marine insurance in this country that that is the manner in which the contract is to be carried out. For these reasons I think that the action was not maintainable, and this appeal must be dismissed.

A. L. SMITH L.J. read the following judgment:—Although the present case arises out of a re-insurance by the plaintiff company of marine risks theretofore undertaken by the defendant company, it may be treated as if the plaintiff company were the underwriters of a policy of marine insurance upon the defendants' ship effected in the ordinary course of business in London through the instrumentality of a broker. The question is whether the underwriter in these circumstances can sue the assured for premiums due to him for so underwriting, or must he look to the broker and to him alone for payment. It cannot be denied that for about a century, at any rate, "according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured and to pay it to the underwriters." I am here quoting the words of Bayley J. in the case of *Power* v. *Butcher* (1), and what was in the year 1829 held by the Court of King's Bench to have

(1) 10 B. & C. at pp. 339, 340.

been the then well-established custom in the business of marine insurance. It would appear from *Edgar* v. *Fowler* (1), in 1803, that this custom was then existing, and Lord Ellenborough, in *Edgar* v. *Bumstead* (2), expressly recognised it and gave judgment on account of what he termed "the well-known course of dealing between the insurance broker, the merchant, and the underwriter." The evidence given in this case shews that this custom has never been departed from, and still exists, whether applied to underwriters underwriting at Lloyd's or to companies who underwrite at the present day. Arnould, in the first and second editions of his work upon Insurance, the first published in 1848 and the second in 1857, cites the above passage from *Power* v. *Butcher* (3) as being the well-known law upon the subject, and in his second edition he sums up the matter thus: "Hence the general rule of law is that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for losses." Phillips, in his fourth edition of his treatise upon Insurance—I am unable to obtain the first edition—vol. i. s. 507 (in the year 1854), thus lays it down: "In England the premium on a marine policy is due from the assured to the broker, and from the latter to the underwriters. The broker has an action against the assured for a premium, and the underwriters against the broker. All other claims and liabilities arising on the policy are between the assured and the underwriters." It is impossible for the plaintiff company to deny the existence of this custom, applicable as it is to the business of marine insurance in general in this country; but they are entitled to insist, if it be the case, that by their policy with the defendant company this undeniable custom is excluded, the express terms of the policy being contrary to and inconsistent with the custom, and this raises the real question in this case.

I must, in the first instance, point out that, if the plaintiffs' contention be correct, then this well-known line of business in this country has been entirely overturned when companies and not individuals are underwriters, for it is proved that the policy

(1) (1803) 3 East, 222. (2) (1808) 1 Camp. 411.
(3) 10 B. & C. at pp. 339, 340.

C. A. 1897

UNIVERSO INSURANCE COMPANY OF MILAN v. MERCHANTS MARINE INSURANCE COMPANY.

A. L. Smith L.J.

in question, so far as material to this point, is the ordinary form of policy which has been and is in use by the underwriting offices in general. The point now taken by the plaintiffs arises because they find that they are unable to obtain the premiums due to them for underwriting the defendants' risks from the broker who effected the policy, he having suspended payment, and the plaintiffs now seek, we are told, for the first time, though like suspensions have often happened before, to get rid of the above-mentioned custom by arguing that by their contract of insurance they have excluded it; or, in other words, that the custom is contrary to and inconsistent with the express terms of the contract.

The contract in question, which is not under seal as my brother Collins thought, is as follows: "Whereas it hath been proposed to the Universo Insurance Company (the plaintiffs) by the Merchants Marine Insurance Company, Limited (the defendants) . . . . to make with the said company the insurance hereinafter mentioned and described, Now this policy witnesseth that, in consideration of the said person or persons effecting this policy (i.e. the defendants) promising to pay to the said company (i.e. the plaintiffs) the sum of 37*l.* 10*s.* as a premium of and after the rate of 7*l.* 10*s.* per cent. for such insurance, the said company takes upon itself the burthen of such insurance to the amount of 500*l.*" In a Lloyd's policy the clause relating to the premium is this: "We the assurers confessing ourselves paid the consideration due unto us for this assurance by the assured."

Now, why is it under a Lloyd's policy that the underwriter has to look to the broker for payment of the premium, and not to the assured? It is, as was pointed out by Lord Wensleydale (then Parke J.) in *Power* v. *Butcher* (1), because "by the course of dealing (that is, by the custom) the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and

(1) 10 B. & C. 347.

so becoming his creditor. The broker is then considered as having paid the premium for the assured." This statement of Lord Wensleydale was approved of by Lord Blackburn in *Xenos* v. *Wickham*. (1) In the present case the broker, according to the ordinary course of business, kept an account with the plaintiffs, and in that account gave them credit for the premium when the policy was effected. Then, why is it to be said that by the policy in question the custom is excluded, the custom being that the broker is considered as having paid the premium to the underwriter when the policy was effected, and the underwriter as having lent it to the broker again, and so becoming his creditor? It is said, because the present policy is expressed to be granted in consideration of the defendants' promising to pay the premium to the plaintiffs, and that this is inconsistent with the custom, and therefore excludes it. But in my judgment this statement in the policy means that the defendants promise to pay the premium to the plaintiffs in the way in which according to the universal custom such payments are made in the business of marine insurance in this country when a policy is effected through the instrumentality of a broker. It seems to me, therefore, that there is nothing in the written contract which excludes the custom, and I agree with Collins J. in the judgment he has arrived at, and consequently this appeal should be dismissed.

CHITTY L.J. read the following judgment :—The established custom in marine insurance effected through a broker is that the assured is not, and that the broker is, liable to the underwriter for the payment of the premium. The ground of the custom appears to be that in most cases the assured is not, and the broker is, known to the underwriter, and, accordingly, that the underwriter gives credit to the broker alone; and that there is an account between the broker and the underwriter in which credit is given for the payment of the premium. In order to sustain this course of business, and to enable the underwriter to recover from the broker the premium, when it is not in fact paid, it is considered in law that the premium has been paid to

(1) 14 C. B. (N.S.) 456.

C. A. 1897

UNIVERSO INSURANCE COMPANY OF MILAN v. MERCHANTS MARINE INSURANCE COMPANY.

Chitty L.J.

the underwriter by the broker, and that the underwriter has lent the premium to the broker. Now, not only is this custom firmly established, but it is settled law that it applies to a Lloyd's policy. A. L. Smith L.J. has in his judgment gone through the authorities which support these propositions, and has dealt with them fully. It is unnecessary for me to cite them again.

The policy before us is not a Lloyd's policy, but a policy which has been in vogue for many years, and is known as a company's policy. Marine policies of this class are all substantially in the same form. They differ in one point from a Lloyd's policy, and it is in respect of this difference that the substantial question arises for consideration on the appeal. There was ample evidence before Collins J. which justified his holding, as he did, that the custom applies to a company's policy, such as that which we have before us; but the question is whether as a matter of law the custom is or is not excluded by the terms of the policy. Collins J. has held that it is not.

Now, in a Lloyd's policy the underwriter confesses that the premium has been paid to him by the assured, although in fact it has not been so paid. A Lloyd's policy is not under seal; consequently the underwriter is not estopped by the policy itself from shewing that the payment which he has acknowledged has not in fact been made. In an ordinary case of contract not connected with marine insurance, and apart from the custom, an acknowledgment of the receipt of money forming the consideration for the promise would go strongly to shew that the person in whose favour the receipt is given is liable to pay the consideration which has not in fact been paid. But on a Lloyd's policy the custom steps in and negatives any such liability on the part of the assured, and it prevails to the extent of relieving him from all liability to pay the premium.

The policy before the Court is not under seal. It purports to be granted in consideration of the persons effecting the policy, that is, the defendants, the assured, promising to pay to the plaintiffs, the insurers, the premium. The defendants did not execute the policy, but by accepting the policy the defendants must be held to have given the promise, subject, however,

to the custom, unless it is excluded by the terms of the promise. In this case there were the usual accounts between the plaintiffs, the insurers, and the brokers, in which credit was given for the premium in the customary manner. According to the custom, as already stated, the broker is deemed to have paid the premium to the underwriter, and to have borrowed it from the underwriter. Collins J. calls this a fiction. I do not dissent from his term; but, like all fictions in law, it was raised for the purpose of justice: to give effect to the true understanding of mercantile men, and to sustain the universal course of business between business men. Fiction or no fiction, it is law too firmly established to justify us in disregarding it. Now, applying this law to the policy in question, it seems to me that the promise by the assured to pay the premium may be read as a promise to pay in the customary manner, namely, by the broker, or, alternatively, that the broker is to be deemed according to the custom and in point of law to have paid the premium; and that by such payment the promise on the part of the assured has been fulfilled. In the result, I think that the custom is not excluded, and that the judgment of Collins J. is right.

Appeal dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

1897
March 31;
April 5;
May 27.

THE ATTORNEY-GENERAL *v.* WOOD AND OTHERS.

Revenue—Estate Duty—Property Passing on Death—Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5.

By ss. 1 and 2 of the Finance Act, 1894, estate duty is imposed upon property, real or personal, settled or not settled, "which passes on the death" of every person dying after the commencement of the Act. By s. 5, sub-s. 3, where the interest of any person under a settlement fails before it becomes an estate in possession, "and subsequent limitations under the settlement continue to subsist," the property shall not be deemed to pass on his death.

By a marriage settlement personal property belonging to the wife was settled upon trusts to pay the income to her during the joint lives of her husband and herself, and after the death of such one of them as should first die, to pay the income to the survivor during his or her life, and if the wife should survive her husband, and there should be no children of the marriage, then in trust for her absolutely. There were no children of the marriage. The wife survived her husband, who died after the commencement of the Act:—

Held, that on his death "subsequent limitations under the settlement continued to subsist" within the meaning of s. 5, sub-s. 3, so that estate duty was not payable.

INFORMATION by the Attorney-General on behalf of the Crown claiming estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30).

The material facts appearing from the information and the defendants' answer thereto were as follows: By an indenture of settlement dated January 8, 1877, and made in consideration of the then intended marriage (which was shortly afterwards solemnized) between the Reverend C. L. Vaughan and Miss Henrietta Barbara Goschen, the latter assigned to the defendants, their executors, administrators, and assigns, all the share and interest to which she was then entitled under her father's will contingently, possibly, or in reversion in a sum of 85,000*l.* and the stocks, funds, and securities representing the same, upon trust, during the joint lives of C. L. Vaughan and Henrietta Barbara Goschen, to pay the income of the trust fund to Henrietta Barbara Goschen for her sole and separate use, without power of anticipation, and after the death of such

1897

ATTORNEY-GENERAL v. WOOD.

one of them, C. L. Vaughan and Henrietta Barbara Goschen, as should first die, upon trust to pay such income to the survivor of them and his or her assigns during his or her life, and after the death of the survivor, upon certain trusts in favour of the issue of the marriage, and if there should be no issue of the marriage, in trust, after the death of C. L. Vaughan, if Henrietta Barbara Goschen should survive him, for her, her executors, administrators, and assigns.

Mrs. Vaughan's contingent interest in the trust funds became an interest in possession in March, 1895.

C. L. Vaughan died in August, 1895. There was no issue of the marriage, and Mrs. Vaughan consequently became absolutely entitled on his death to the property settled by her.

The information alleged that, under these circumstances and having regard to the Finance Act, 1894, estate duty became payable upon the death of C. L. Vaughan in respect of the enlargement of the interest of Mrs. Vaughan in the settled property from a life interest into an absolute interest in possession—that is to say, on the capital of the settled funds, less the value of her interest therein.

The informant prayed a declaration to that effect; that an account, if necessary, might be directed to ascertain the amount of the estate duty payable, and that the defendants might be ordered to pay such amount and interest to the Commissioners of Inland Revenue.

Sir Richard Webster, A.-G., Sir Robert Finlay, S.-G. (*Vaughan Hawkins* with them), for the Crown.

Sir Robert Reid, Q.C., and *Austin Cartmell*, for the defendants.

The arguments sufficiently appear from the judgment of Vaughan Williams J. (1)

Cur. adv. vult.

May 27. The following judgment was read by

VAUGHAN WILLIAMS J. In my opinion our judgment in this case should be for the defendants. [The learned judge stated the

(1) Post, pp. 105, 106, 107, 108.

1897

ATTORNEY-GENERAL v. WOOD.

Vaughan Williams J.

provisions of the marriage settlement of January 8, 1877.] So, in popular language and in the events which have happened—that is to say, failure of issue and death of Mr. Vaughan in his wife's lifetime, and the death of all other persons entitled to any interest under the will of Mrs. Vaughan's father—Mrs. Vaughan has now become the absolute owner of the trust fund in possession. The Crown contends that in this state of circumstances estate duty has become payable under the provisions of the Finance Act, 1894, upon the capital value of the trust fund comprised in the said settlement, less the value at the time of Mr. Vaughan's death of the life interest of Mrs. Vaughan in the trust fund. The estate duty, if leviable at all, must be so leviable under the provisions of ss. 1 and 2 of the Finance Act, 1894. [The learned judge read those sections. (1)]

Now, the first question is whether any property passed to Mrs. Goschen on the death of her husband. It is clear that no property passed within the meaning of s. 2, sub-s. 1 (*a*)—that is to say, no property passed of which the deceased at the time of his death was competent to dispose. If property passed at all it must be by virtue of the definition in s. 2, sub-s. 1 (*b*)—that is to say, property in which the deceased (Mr. Vaughan) had an interest ceasing on his death to the extent to which a benefit

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(*a*) Property of which the deceased was at the time of his death competent to dispose;

"(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

The Act came into operation on August 2, 1894.

accrues or arises by cesser of such interest. Now, if the words at the beginning of s. 2, sub-s. 1 (*b*), are taken alone, they seem clearly wide enough to include the present case, because the 85,000*l*. fund was property in which the deceased (Mr. Vaughan) had an interest (it is true not an interest in possession) which ceased on his death, and that a benefit (it is true not a benefit in income) accrued by the cesser of such interest—that is to say, a benefit accrued by the cesser of her husband's contingent interest to Mrs. Vaughan; for upon the cesser of her husband's interest she would have been able to get a larger price if she had sold her own interest, and from a pecuniary point of view her husband's interest would during his lifetime have been worth something to her if she had desired to purchase it. Now, this being so, it remains to be seen whether there is anything either in the residue of the section or in the other sections of the Act to cut down "the interest of the deceased" to mean "an interest of the deceased in possession," or to cut down the meaning of "benefit accruing" to "benefit accruing in income." Now it is said that the words at the end of s. 2, sub-s. 1 (*b*), "as holder of an office or recipient of the benefits of a charity or a corporation sole," indicate that clause (*b*) only applies to interests in possession because the words "holder," "recipient," and "corporation sole" are inapplicable except to an interest in possession. It is very difficult to conceive of a concrete case in which there should be a contingent right to receive the benefits of a charity, but it would certainly seem as if the death of such a person, and the consequent cesser of the contingent interest, might cause a benefit to some one taking an absolute interest in remainder, and that such a case would be outside the words of this exception, and that consequently estate duty would be payable unless "interest" in this section is construed to mean "interest in possession," and it is of course inconceivable that the Legislature intended estate duty to be paid in a case where the deceased was not a recipient through the interest not having fallen into possession, and not to be payable in the case where the deceased was a recipient and had an interest in possession.

But I do not think that these considerations are sufficient by

1897

ATTORNEY-GENERAL v. WOOD.

Vaughan Williams J.

themselves to cut down the natural meaning of the words in the earlier part of the section. I think the more proper view is to regard these words as a piece of imperfect drafting. Now the next ground upon which it is said that the words of s. 2, sub-s. 1 (*b*), ought to be limited in the way suggested is that s. 7, sub-s. 7 (1), which prescribes the measure of the value of the benefit accruing from the cesser of an interest ceasing on the death of the deceased, prescribes a measure based upon the assumption that the interest ceasing is an interest in possession, because it speaks of the interest extending to the whole income of the property, or to less than the whole income of the property, and deals only with those two cases, and it is said that "income" is a term applicable only to estates in possession, and that the deceased, who was not in possession, had no interest in the income, and that, even if it is said that he had a contingent interest in the prospective income, the prospective income is not necessarily the same as the income at the time of his death, but might, if the interest fell into possession, be greater or less than the income produced by the property at the time of his death. It is to be observed on this argument that, although estate duty under s. 2, sub-s. 1 (*b*), is only leviable in respect of property in which the deceased had an interest ceasing on death to the extent to which benefit accrues by the cesser, and although s. 7, sub-s. 7, purports to prescribe a measure of the value of that benefit, the measure actually prescribed seems to be the value of the property out of which the income flows, and not the value of the benefit. I wish to say here that nothing which follows in my judgment with regard to s. 7 must be taken as a judgment on the construction of that section. It is not necessary for my judgment that I should construe it. I am only dealing with the construction

(1) Sect. 7, sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

"(*a.*) if the interest extended to the whole income of the property, be the principal value of that property; and

"(*b.*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

suggested by the Crown in the course of argument. The suggested departure of s. 7, sub-s. 7, from s. 2, sub-s. 1 (*b*), by the substitution as the subject of taxation of the property in which the deceased had an interest for the interest which he had to the extent to which benefit accrues by the cesser of that interest, and the apparent injustice and inconsistency of this substitution, properly lead to such a construction of the Act as might minimize its operation; but I cannot bring myself to the conclusion that it was intended by the Legislature to limit s. 2, sub-s. 1 (*b*), to interests in possession, and exclude from taxation benefits arising from cesser of a contingent life estate which has not fallen into possession. It is obvious that the benefit arising from such cesser might be of most substantial pecuniary value, and it seems to me that the scheme of the Act is intended to include not only every case of property passing by death, but that s. 2, sub-s. 1 (*b*), shews that the scheme also includes every benefit accruing by death even though the property from which the benefit is derived does not itself pass. No one, I think, would hesitate to come to this conclusion if the Legislature had limited the duty by the value of the benefit accruing, and I do not think that we are entitled to refrain from coming to this conclusion because the Legislature has adopted what seems to be an irrational measure of that benefit. I am quite aware that those who argued on behalf of the Crown attempted to avoid the inconsistency between s. 7, sub-s. 7, and s. 2, sub-s. 1 (*b*), by saying that the words "extent of the benefit" mean "extent in proportion of the income or profit of the property receivable by the deceased in respect of his interest." I do not agree in this view; but, even supposing that the apparent inconsistency between s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7, can be avoided by this construction, another difficulty remains, which the Crown itself has recognised in the information, and that is, that if the construction of the Crown is right and the inconsistency between the two sections is thus got rid of, it is difficult to understand why the Crown has deducted in their claim the value of the life interest of Mrs. Vaughan; for so to do is clearly to recognise that the quantum of estate of the deceased must be taken into consideration. Holding therefore,

1897

ATTORNEY-GENERAL v. WOOD.

Vaughan Williams J.

as I do, that there was, within the meaning of s. 2, sub-s. 1 (*b*), a cesser of interest on Mr. Vaughan's death, and a benefit accruing therefrom, it remains to consider what is the value of that benefit, and, lastly, whether there is anything in the facts of this case to exempt the defendants from paying duty. Now first, what is the measure? Can you apply s. 7, sub-s. 7? To apply the measure given by this section according to the contention of the Crown would seem to be the application of an obviously unjust measure. It is this no doubt which accounts for the modulation of the claim of the Crown. The Attorney-General seemed disposed to get out of the application of the section by accepting the suggestion that it could not apply, and saying that the section was not exhaustive—i.e., that the measure was not of universal application. I dissent from this, and I think that in cases where the measure cannot be applied no duty can be levied, and it seems clear that the only ground upon which the section can be held not to apply would be that the words it contains relative to income limit its application to estates not in possession. In my opinion, therefore, s. 7, sub-s. 7, does supply the measure. If, however, s. 7, sub-s. 7, does not supply the measure, and interests passing other than those in possession are property taxable with estate duty, I think that the measure would be, not that suggested by the Crown, but the increase in value of the absolute property in the reversion having regard to the outstanding life estate of Mrs. Vaughan by the cesser by death of Mr. Vaughan's contingent interest. This is the result which one would expect from the general scheme of the Act, but unfortunately the Legislature has not said so. The mistake seems to have arisen from the desire of the draftsman for uniformity, leading him, in the case of cesser by death of an interest, to make the property and not the benefit the measure of value for the purposes of taxation, because it happens to be so in the Act generally. I desire to repeat that I have not been construing s. 7. The section is very difficult to construe, and I should not feel justified in construing it unless it were necessary to my judgment to do so, which it is not. It remains only to consider the exemptions. Two are suggested—namely, those contained in s. 5, sub-s. 3,

and s. 21, sub-s. 5. (1) The property in question seems to be settled property within the meaning of s. 22, sub-s. 1 (*h*). It will be observed that in the case of settled property a further estate duty called settlement estate duty on the principal value of the settled property is payable as soon as the property passes, unless the passing be to the wife or husband of the deceased, but the settlement estate duty is only once payable during the continuance of the settlement. Those are the exemptions regarding settlement estate duty. Sub-ss. 2 and 3 of s. 5 provide exemptions also in the case of estate duty. Sub-sect. 2 provides that if estate duty has been paid in respect of settled property, estate duty shall not be payable in respect thereof until the death of some person competent to dispose of the property, and then sub-s. 3 provides that in the case of settled property, where an interest of a person fails before it becomes an interest in possession, property shall not be deemed to pass on his death if subsequent limitations (which, I take it, means one or more) under the settlement continue to subsist. Now, did subsequent limitations under the settlement continue to subsist at the death of Mr. Vaughan? I think they did, notwithstanding the fact that Mrs. Vaughan thereupon became absolutely entitled to this property and could have demanded a transfer of it from the trustees. I think that "subsist" properly describes any estate created by the settlement which has not come to an end. I do not think that such an estate is the less a limitation because there is no estate limited beyond it—in other words, I think that limitations under the settlement continue until the death of a person who was, at the time of

(1) Sect. 5, sub-s. 3: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

Sect. 21, sub-s. 5: "Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor."

1897

ATTORNEY-GENERAL v. WOOD.

Vaughan Williams J.

his death during the continuance of the settlement, competent to dispose of such property. If it is said that these sub-sections assume that estate duty and settlement estate duty have each of them been paid in respect of this property, I can only say that, although no doubt the sub-sections were passed in contemplation of that state of things, the Legislature has not seen fit so to limit them, and no injustice seems to be done, because the death of Mrs. Vaughan will be the first occasion on which the property settled by the marriage settlement will pass by reason of death, except in the case of the death of Mr. Vaughan, on the happening of which s. 5, sub-s. 1 (*a*), expressly prevents settlement estate duty becoming payable, and so far as regards interests passing under the will of Mrs. Vaughan's father the existing duties seem to have been paid. In my judgment s. 5, sub-s. 3, prevents either settlement estate duty or estate duty becoming payable. I wish to add that I do not think that the fact that s. 14 of the Finance Act, 1896 (59 & 60 Vict. c. 28), contains an enactment in the sense of the construction which I am now putting on s. 5, sub-s. 3, of the Act of 1894 shews that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and, even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier.

The other exemption suggested is under s. 21, sub-s. 5. I do not think this exemption has any operation. Mrs. Vaughan did not on Mr. Vaughan's death become entitled to the income of the property settled by herself: that income was already hers in possession at the time of the death; and, moreover, Mrs. Vaughan did not, as survivor, become entitled to income of any property settled by her on her husband either solely or jointly.

I do not think that *Attorney-General* v. *Robertson* (1), which is a decision under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), has any application, nor the observations of Lindley L.J. (2) to which we were referred.

(1) [1893] 1 Q. B. 293. (2) [1893] 1 Q. B. at pp. 301, 302.

1897

ATTORNEY-GENERAL v. WOOD.

WRIGHT J. I agree. I think that s. 5, sub-s. 3, applies to exempt the defendants. As regards s. 7, sub-s. 7, I confess that I do not know what it means. I am inclined to think that it is not intended to be exhaustive, but I do not express that as a judicial opinion.

Judgment for the defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Druces & Attlee.*

W. A.

[IN THE COURT OF APPEAL.]

MEXBOROUGH (EARL OF) *v.* WHITWOOD URBAN DISTRICT COUNCIL.

C. A.
1897
May 31.

Practice—Discovery—Action for Forfeiture of Lease—Affidavit of Documents—Interrogatories—Order XXXI., *rr.* 1, 2, 12.

In an action to enforce a forfeiture of a lease for breach of covenant the Court will not grant discovery of documents or leave to administer interrogatories for the purpose of establishing the forfeiture.

Pye v. *Butterfield*, (1864) 5 B. & S. 829, approved of.

Seaward v. *Dennington*, (1896) 44 W. R. 696, overruled.

APPEAL from an order of a judge at chambers refusing discovery as after mentioned.

The action was by lessor against lessees to recover possession of the demised premises on the ground of forfeiture by breach of a covenant not to assign or underlet without the consent of the landlord. The only question at issue in the action was whether there had been a forfeiture by breach of the covenant. The plaintiff having applied at chambers for an order for discovery of documents by the defendants and also for leave to administer interrogatories, the master granted the application. The interrogatories were directed to the question whether there had been a forfeiture by breach of the covenant. The judge on appeal reversed the master's decision, and refused to allow either the discovery of documents or the interrogatories. (1)

(1) The defendants had by their statement of defence put in issue the plaintiff's title as landlord, and certain of the interrogatories which the

C. A.
1897

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL.

Scott Fox, for the plaintiff. With regard to the discovery of documents this case falls within the decision in *Seaward* v. *Dennington* (1), where it was held that the defendant in an action for forfeiture was bound to make an affidavit of documents. There is no substantial distinction between interrogatories and discovery of documents for this purpose. It was decided in *Chester* v. *Wortley* (2) that interrogatories might be administered in an action for a forfeiture, and any objection to answering them on the ground of privilege must be taken in the answer. It was no doubt held by this Court in *Martin* v. *Treacher* (3) that in an action for penalties by a common informer leave could not be given to administer interrogatories to the defendant; but there is a great distinction between an action for penalties, which, though in form a civil action, is in substance a criminal proceeding for the purpose of punishment, and an action for a forfeiture for breach of covenant, which is really only to enforce a right of property given by the defendant's own contract. [He also cited *Lyell* v. *Kennedy*. (4)]

E. Tindal Atkinson, Q.C., and *Montague Lush*, for the defendants. Discovery was never granted by the Court of Chancery in aid of an action at common law for a forfeiture: *Lord Uxbridge* v. *Staveland*. (5) In the case of *Pye* v. *Butterfield* (6) the Court of Queen's Bench held that interrogatories could not be administered in such an action. An action for penalties and an action to enforce a forfeiture have always been treated as standing on the same footing with regard to discovery. There can be no distinction in principle in this respect between interrogatories and discovery of documents. In *Hunnings* v. *Williamson* (7) discovery of documents was refused in an action for penalties. The effect of discovery of documents would be the same as that of interrogatories. Assuming that there had been an underlease in breach of a

plaintiff originally sought to administer related to that issue; but in the Court of Appeal the defendants' counsel undertook to admit the plaintiff's title, and therefore no question ultimately arose as to whether these interrogatories could be administered.

(1) 44 W. R. 696.
(2) (1856) 17 C. B. 410.
(3) (1886) 16 Q. B. D. 507.
(4) (1883) 8 App. Cas. 217.
(5) (1747) 1 Ves. Sen. 56.
(6) 5 B. & S. 829.
(7) (1883) 10 Q. B. D. 459.

covenant not to underlet, and the defendant had the counterpart in his possession, he would be obliged in his affidavit of documents to describe the document sufficiently to identify it, and he might thereupon be subpœnaed to produce it at the trial, and there would be no privilege against production then. It is submitted that *Seaward* v. *Dennington* (1) is in conflict with the principle of previous decisions of the Court of Appeal on the subject, and cannot be supported. It was said in that case that the defendant must make an affidavit of documents, but could cover up any document that might shew the existence of a forfeiture; but it is submitted that the plaintiff is in this dilemma: either the order for discovery would force the defendants to disclose the existence of such a document, so that the plaintiff could compel its production at the trial, or it would not. In the former case the principle of the previous decisions is contravened; in the latter case the discovery of documents would be useless, and therefore unnecessary, and rule 12 of Order XXXI. expressly provides that the judge may refuse discovery if satisfied that it is unnecessary. This rule was not cited in *Seaward* v. *Dennington*. (1)

[They also cited *Hobbs & Co.* v. *Hudson* (2); *May* v. *Hawkins*. (3)]

Scott Fox, in reply. *Pye* v. *Butterfield* (4) is the only decision on the subject with regard to an action to enforce a forfeiture. The other decisions relied on by the defendants relate to actions for penalties, and depend on the quasi-criminal character of such actions. It would appear from the report of *Pye* v. *Butterfield* (4) that the question in that case was not really whether interrogatories as to the existence of a forfeiture could be administered, but whether the defendant could be compelled to answer them. It is stated in the report that the interrogatories which are set out had been already administered. The expressions in the authorities which couple forfeiture and penalties together in relation to this subject really contemplate some forfeiture of estate in the proper sense of the term and in the nature of a penalty, not a case where an estate is determined

(1) 44 W. R. 696.
(2) (1890) 25 Q. B. D. 232.
(3) (1855) 11 Ex. 210.
(4) 5 B. & S. 829.

C. A. 1897

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL.

by the terms of the contract into which the defendant himself has entered, which, though no doubt usually termed a forfeiture, is not really one strictly speaking. The fact that the Court of Chancery would not before the Judicature Act aid an action of ejectment at common law upon forfeiture of a lease, by exercising its ancillary jurisdiction to grant discovery, is not really the true test. The procedure for discovery given by the rules is far wider in its scope than the old Chancery jurisdiction; and there is now no reason why, in a common law action to enforce a right to land arising under the terms of the lease into which the parties have entered, the Court should not exercise in aid of the action the procedure for discovery which applies to actions generally. The case of an action for a penalty by a common informer is peculiar, for before judgment the plaintiff cannot be said to have any better right to the penalty than any one else; but, in an action such as the present, the plaintiff is only seeking to enforce a right to land which is vested in him by the contract. The case of *Ind, Coope & Co.* v. *Emmerson* (1) shews that the fact that before the Judicature Act the Court of Chancery would not exercise its ancillary jurisdiction to grant discovery is not the test whether discovery can now be allowed in an action. In that case, an action having been brought to recover possession of land in the Chancery Division, it was held that the fact that the defendants were purchasers for valuable consideration without notice was no ground for refusing discovery and production of documents to the plaintiff.

LORD ESHER M.R. In this case the plaintiff has brought an action against the defendants for the purpose of obtaining a judgment of the Court to the effect that the defendants have forfeited a lease of certain premises by reason of a breach of covenant. The plaintiff applied for an order for discovery of documents, and also for leave to administer interrogatories to the defendants. The learned judge at chambers refused both applications, and the plaintiff appeals against that decision. I think that there are two rules of law which have always existed

(1) (1887) 12 App. Cas. 300.

as part of the common law of England, and have been recognised as such by all courts whether of law or equity, and the rights conferred by them have never been taken away by any statute. The first is that, where a common informer sues for a penalty, the Courts will not assist him by their procedure in any way: and I think a similar rule has been laid down, and acted upon from the earliest times, in respect of actions brought to enforce a forfeiture of an estate in land. These are no doubt rules of procedure, but they are much more than that: they are rules made for the protection of people in respect of their property, and against common informers. There has been a great searching for reasons for these rules; but it does not signify what the reasons for them are, if they are well recognised rules which have existed from time immemorial. But the reasons for them have often been stated. It has been argued that the reason why the Courts will not assist the plaintiff in an action for a penalty is that it is a criminal action. But it is not. There is no such thing as a criminal action. An action for a penalty is a civil action just as much as an action for a forfeiture. The rule by which a witness is protected from being called on to answer questions which may tend to criminate himself is often referred to in connection with this subject, but it has really nothing to do with the two rules to which I have referred. In an action for a penalty there can be no question of the defendant's being called on to criminate himself. With regard to such actions the law is laid down in *Martin* v. *Treacher*. (1) It was held in that case that there is a rule of law which prevents the application of any of the procedure with regard to discovery in an action for a penalty by a common informer. It is not put on any ground peculiar to courts of equity, but on the ground of a general rule of law applicable both in courts of law and courts of equity. The principle there laid down is equally applicable to discovery by affidavit of documents as to discovery by interrogatories. It was held that the procedure with regard to discovery, which includes both methods of discovery, was not applicable to an action by a common informer.

(1) 16 Q. B. D. 507.

C.A. 1897

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL.

Lord Esher M.R.

With regard to the case of an action brought to enforce a forfeiture of land, I may refer to the passage which I cited in *Martin* v. *Treacher* (1), from the judgment of Alexander C.B. in *Orme* v. *Crockford* (2), where he says: "We must not lose sight of the fact that it is a most important right of which this bill seeks to deprive the defendant, no less than that of protecting himself by refusing to answer from the consequences of answering questions which might tend to charge him with a crime or subject him to penalties, or forfeiture of estate contrary to the humane policy of the law." This question came before the Queen's Bench in 1864 in *Pye* v. *Butterfield* (3), in which case a rule had been obtained calling on the defendant to shew cause why certain interrogatories should not be administered. It was argued that the only question decided in that case was whether such interrogatories must be answered when administered. All I can say is that that was not the question which the judges affected to decide. The plaintiff had no doubt administered the interrogatories set out in the report, but the Court ignored that fact in their judgment, and decided that no interrogatories could be allowed where the answers might subject the defendant to a forfeiture of his interest as lessee. In giving judgment Cockburn C.J. said: "It is clear from the decisions in those courts (courts of equity) which have been cited and the expressions used by eminent text-book writers that it is a fixed rule that no bill of discovery will be allowed where the answers may have the effect of causing a forfeiture of estate, except where the estate is held on a conditional limitation, in which case it would be extinguished on non-performance of the condition." And Crompton J. said: "I have no doubt that the exemption from a bill of discovery in cases where discovery would lead to a forfeiture was adopted in those courts from the courts of law." Then we come to the case of *Seaward* v. *Dennington* (4), to which A. L. Smith L.J. was a party. But, on consideration of the authorities which have been cited to us on the present occasion, I venture to think that the judgment in that case

(1) 16 Q. B. D. at p. 511.
(2) (1824) 13 Price, 376.
(3) 5 B. & S. 829.
(4) 44 W. R. 696.

cannot be considered to be correct, and I believe that, upon further consideration of the matter, the Lord Justice himself is of the same opinion.

We were referred to the case of *Ind, Coope & Co.* v. *Emmerson* (1), and it was suggested that the effect of that decision was to shew that the two rules of law to which I have referred, and which, as I have said, are not mere rules of procedure, were done away with by the Judicature Act. I do not think that was the effect of the decision. I do not think the House of Lords meant to decide that the Judicature Act had done away with these two fundamental rules of law for the protection of people in respect of their title to property and against common informers. There appears to me to be ample authority for saying that an action for forfeiture stands for the present purpose on the same footing as an action for penalties. I think the proper enunciation of the law on the subject is that, where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land, the Court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories. There may be an action where that is one of the issues and there are other independent issues, and the Court may with regard to those other issues make an order for discovery of documents and interrogatories, but on the issue relating to forfeiture I think the Court will not make such an order. When, as in the present case, the sole issue raised is whether there has been a forfeiture, I think no order can be made in favour of the plaintiff either for discovery of documents or for the administration of interrogatories. For these reasons I think the order of the learned judge at chambers was correct and this appeal should be dismissed.

A. L. SMITH L.J. This is an action by lessor against lessees, in which the plaintiff seeks to establish a forfeiture of the lease by the defendants by reason of a breach of covenant by them. Such an action appears to me to be rightly called an action for a "forfeiture" according to both the technical and the ordinary

(1) 12 App. Cas. 300.

C. A. 1897

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL.

A. L. Smith L.J.

meaning of the term. The plaintiff sought to obtain two sorts of discovery from the defendants. He sought to make them disclose what documents they had in their possession and also to interrogate them. The master having allowed the plaintiff's application for both sorts of discovery, the judge on appeal reversed his decision and disallowed both. The question is whether he was right in so doing.

It is clear upon the authorities, of which *Martin* v. *Treacher* (1) in this Court is the most recent, that, in an action for penalties by a common informer, the plaintiff will not be allowed to administer interrogatories. It is not merely that the defendant can refuse to answer the interrogatories as in the case of interrogatories which tend to criminate, but the interrogatories will not be allowed. The decision in *Martin* v. *Treacher* (1) was in 1886. Prior to that, in 1883, it had been decided by the Queen's Bench Division in *Hunnings* v. *Williamson* (2) that in an action for penalties by a common informer neither interrogatories nor discovery of documents would be allowed. That decision was supported in *Martin* v. *Treacher*. (1) These two decisions are ample authority to shew that in an action for penalties neither sort of discovery will be granted.

Then we come to the question whether either kind of discovery will be allowed in an action for forfeiture. The plaintiff's counsel contends that different considerations apply to such an action. But I cannot find that any substantial distinction has been drawn for this purpose between an action for a penalty and an action for a forfeiture. The courts of common law appear to have always been very chary of assisting actions for either. In 1864 the case of *Pye* v. *Butterfield* (3) was decided, which like this was an action to enforce a forfeiture. In that case the Court of Queen's Bench held that interrogatories could not be administered. There seems to be some difficulty about the facts of that case, for one set of interrogatories appears to have been delivered and answered, and then application was made for leave to deliver another set; but I agree that the judgment of the Court was directed to the question whether in such an

(1) 16 Q. B. D. 507. (2) 10 Q. B. D. 459.
(3) 5 B. & S. 829.

action interrogatories could be delivered, and it was held that they could not. Then we come to the case of *Seaward* v. *Dennington* (1), before myself and my brother Rigby. I cannot find any case before that in which the question has been raised whether the defendant in an action for forfeiture is bound to make an affidavit of documents. My impression at that time was that the practice with regard to this was in accordance with what we there decided, and the question would arise when inspection was sought; but, having heard the arguments in this case, I must say that I cannot see any answer on principle to the argument that, if interrogatories cannot be allowed in an action for forfeiture, there is no reason why discovery of documents should be allowed. I cannot see any distinction for this purpose between the two sorts of discovery. It therefore seems to me that my decision in *Seaward* v. *Dennington* (1) was not right, and that in future it ought not to be followed.

The next point that was taken was this. It was argued by the counsel for the plaintiff that the case of *Ind, Coope & Co.* v. *Emmerson* (2) in the House of Lords was an authority in his favour. I do not think that case has anything to do with the present question. In former times it was held in the Court of Chancery that it was a good answer to a bill for discovery in aid of an action at law that the person against whom it was sought was a purchaser for value without notice; but the House of Lords held that since the Judicature Act that was no answer to an application for discovery in an action in which the Chancery Division had complete jurisdiction over the whole matter in dispute. The plaintiff's counsel argued on the strength of that decision that, whatever may have been the rule as to discovery in regard to an action for forfeiture in former times, we ought now to hold that it has been abrogated just as the doctrine with regard to a purchaser for value without notice was held to be in the House of Lords. I cannot agree with that contention. The House of Lords were not dealing in that case with the question of an action for forfeiture.

There is a further subsidiary difficulty in the plaintiff's way. The rules provide that discovery of documents and interrogatories

(1) 44 W. R. 696. (2) 12 App. Cas. 300.

C. A. 1897

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL.

A. L. Smith L.J.

shall only be allowed where the judge considers them necessary. The matter is therefore one for the discretion of the judge. If an order for discovery of documents were made in this case, as I pointed out in *Seaward* v. *Dennington* (1), the defendants could cover up any document that would expose them to a forfeiture. That being so, it would be useless to make the order for discovery. For these reasons I think the order of the learned judge at chambers was quite right.

CHITTY L.J. This is an appeal from the decision of a judge at chambers refusing to allow discovery, either by affidavit of documents, or by interrogatories. The action is brought simply to enforce a forfeiture of the defendants' lease, and no other question arises in the action besides the question whether there has been a forfeiture. It was argued by the counsel for the plaintiff that this was not a case of forfeiture in the proper sense of the term. The answer to that appears to me to be that, ever since the time of *Dumpor's Case* (2), it has always been treated as such, and as coming therefore within the strict rules with which the Courts have fenced round any question of forfeiture of a lease of land. It was argued further that the law on this subject has been altered by the decision in *Ind, Coope & Co.* v. *Emmerson* (3) in the House of Lords. All that was decided in that case was that, since the Judicature Act, that which would have been a good defence to a suit for discovery in equity, namely, that the person against whom discovery was sought was a bonâ fide purchaser for value without notice, was not a reason for refusing discovery in an action brought in the Chancery Division to recover possession of land, and claiming production of certain documents of title. I do not think it was intended by that decision to alter the whole law on the subject, as contended by the plaintiff's counsel. What has been the course of decision in relation to actions for forfeiture both in courts of equity and courts of law? A bill for discovery would clearly not have lain in aid of such an action as this. The Court of Queen's

(1) 44 W. R. 696. (2) (45 Eliz.) 4 Rep. 119.
(3) 12 App. Cas. 300.

Bench in *Pye* v. *Butterfield* (1) decided that a similar rule prevailed in courts of common law. The judgment of Crompton J. in that case is very instructive on the point. I think that he is probably right in saying that the courts of equity borrowed their doctrine from the principles of the common law. It seems to me that that case was rightly decided.

Then comes the comparatively narrow question as to the point of time at which the objection to discovery should be taken. Under the present rules as to discovery and interrogatories a discretion is vested in the Court or judge, and there is no absolute right to discovery. It is plain that the interrogatories sought to be administered are all addressed to the question of forfeiture, and also that the discovery of documents is only sought for in order to establish a forfeiture. It therefore appears to me to be right to do what was done in *Pye* v. *Butterfield* (1) by the Court of Queen's Bench, namely, to stop the matter in limine, and not to put the defendants to make an affidavit of documents and to answer the interrogatories, when it is clear that the question of privilege will arise in respect of both. The counsel for the plaintiff shrank from saying what the result would be, if he obtained the order for which he asked; but, though he would not indicate what rights the plaintiff might have with regard to inspection of documents or a further answer to interrogatories, it is plain to me that the plaintiff would get no further, if the order for discovery of documents and interrogatories were made. The defendants would still have the same privilege and it would prevail. It may be that there is a distinction in some respects between a penalty and a forfeiture, but in the old decisions they have always been linked together and treated on the same principle in relation to discovery.

Appeal dismissed.

Solicitors for plaintiff: *Vincent & Vincent, for North & Son, Leeds.*

Solicitors for defendants: *T. A. Jones, for C. A. Phillips, Castleford.*

(1) 5 B. & S. 829.

C. A.
1897
May 24.

[IN THE COURT OF APPEAL.]

MACAULAY *v.* POLLEY.

Solicitor and Client—Compromise of Claim by Solicitor—No Implied Authority before Action.

A solicitor employed to act for a client in regard to his claim against a third person has, before action brought, no implied authority to effect a compromise.

APPEAL from an order of a judge at chambers refusing to stay the action.

The action was brought to recover compensation for personal injuries sustained by the plaintiff. It appeared that the plaintiff had given authority to a solicitor to act for him in the matter of his claim against the defendant. The solicitor thereupon, before any action was brought, entered into negotiations with the defendant, and agreed to accept a sum of fifteen guineas in settlement of the claim, and this amount and two guineas costs were paid to the solicitor. The money was not paid over to the plaintiff, and he never assented to the compromise of his claim. The plaintiff having commenced this action, application was made at chambers for a stay of proceedings on the ground that the claim of the plaintiff had been satisfied. Grantham J. dismissed the application.

The defendant appealed.

Stephen Lynch, for the defendant. In the case of an action a solicitor has authority to compromise unless he is expressly forbidden to do so: *Fray* v. *Voules* (1); *Chown* v. *Parrott*. (2) The fact that no writ has been issued does not affect this authority, and the compromise effected is a bar to this action.

C. E. Jones, for the plaintiff, was not called upon.

LORD ESHER M.R. In this case a person received an injury for which he thought he ought to be compensated, and the

(1) (1859) 1 E. & E. 839; 28 L. J. (Q.B.) 232.

(2) (1863) 14 C. B. (N.S.) 74; 32 L. J. (C.P.) 197.

clerk to a solicitor went to see him, and obtained from him authority to act for him in the matter as his solicitor. Before any action was commenced, and without any evidence of anything more passing between the injured man and the solicitor's clerk, the solicitor accepted a sum of money in satisfaction of the injured man's claim. This compromise was agreed to between the solicitors of the two parties and the money was paid over. Under such circumstances it has been held in the case of *Duffy* v. *Hanson* (1) by Willes J. that, in the absence of authority to the solicitor, the compromise was not binding on the principal. This view I agree with, and it is applicable to the facts of this case. The appeal must be dismissed.

A. L. SMITH L.J. This was a summons at chambers to shew cause why the action should not be stayed on the ground that the defendant had already paid a sum of money as a compromise agreed on. It is quite clear that as between the plaintiff and his solicitor the former did not authorize the latter to settle the claim. The solicitor received the money, and the question arises whether that can be treated as an effectual payment against the plaintiff. There are two modes by which it might become effectual—either by the plaintiff receiving the money, or by his holding out the solicitor as a person authorized to settle the matter, and so being estopped from denying his authority. Neither of these circumstances is present here, and there is nothing to prevent the plaintiff bringing this action.

CHITTY L.J. I am of the same opinion. The case falls within the decision in *Duffy* v. *Hanson* (1), and though this Court is not bound by that decision, I consider it perfectly right. There is a difference between the cases in which a solicitor appears for a party in an action, and cases in which no action is in existence. In the former the authority is evident, but in the latter it is a matter of evidence. It is clear there was in this case no express authority to compromise the claim, the authority, taking the evidence in the form most favourable to the

(1) (1867) 61 L. T. 332.

C. A. 1897

MACAULAY v. POLLEY.

defendant's case, being only that the solicitor should act for the injured man; and it is equally clear that the plaintiff never gave his assent to the compromise or received the money.

Appeal dismissed.

Solicitor for plaintiff: *James Gray.*
Solicitors for defendant: *Hillearys.*

A. M.

C. A. 1897 *May* 27.

[IN THE COURT OF APPEAL.]

SPOKES *v.* THE GROSVENOR AND WEST END RAILWAY TERMINUS HOTEL COMPANY, LIMITED, AND OTHERS.

Practice—Discovery—Documents—Action by Shareholder of Company—Allegation of Conspiracy to Defraud Company—Company made Defendants—Obligation on Company to make Discovery of Documents—Objection by Defendant that Discovery may tend to Criminate him—Objection must be taken on Oath—Order XXXI., *r.* 12.

An action was brought by a shareholder in a company, on behalf of himself and other the shareholders of the company, against the directors and another defendant alleging a conspiracy to defraud the company, and that they had been defrauded thereby, and claiming damages to be paid to the company. The company were made defendants:—

Held, that the company were an "other party" to the action within the meaning of Order XXXI., r. 12, and could be called on to make discovery of documents:—

Held, also, that an objection by a defendant that the discovery of documents may tend to criminate him can only be taken to the production of the documents alleged to have that effect, and not to the order for discovery, and must be taken upon oath.

APPEALS against two orders made at chambers.

The plaintiff was a shareholder in the defendant company suing on behalf of himself and other the shareholders, and the defendants were the company, certain directors of the company, and one Drew. The plaintiff alleged a conspiracy between the defendant directors and Drew to defraud the company, and consequent loss to the company, in respect of which he claimed damages to be paid to the company. Two orders were made at chambers, one that the company should file an affidavit of documents, and the other that Drew should file an affidavit of

documents; and against these orders the respective defendants appealed.

May 10. *Farwell, Q.C.*, and *T. M. Stevens*, for the company. The case of the plaintiff depends on the alleged conspiracy, and that is the sole issue between the parties. There is, therefore, nothing to try between the plaintiff and the company. There are no rights to be adjusted, no issue raised between them, and no relief prayed against the company. *Shaw* v. *Smith* (1) is an authority that under such circumstances discovery will not be ordered.

[They cited also *Burchard* v. *Macfarlane* (2) and *Burstall* v. *Beyfus* (3), and argued on the affidavits that the application for discovery was not made bonâ fide.]

J. Eldon Bankes, for the plaintiff. The company were necessary parties to the action and are properly made defendants, because the defendant directors control the company, and would prevent any action being taken in the name of the company. They are, therefore, an "other party" within the meaning of Order XXXI., r. 12 (4), and as such can be ordered to make discovery. [He cited *Orr* v. *Diaper* (5); *Ramsden* v. *Brearley* (6); *MacAllister* v. *Bishop of Rochester* (7); *Gouraud* v. *Edison Gower Telephone Co.* (8); *Day* v. *Drake*. (9)]

Farwell, Q.C., in reply. The old Chancery practice was that unless a defendant had some interest in the subject he could not be compelled to answer a bill for discovery: Mitford on Pleading, p. 188; *Fenton* v. *Hughes* (10); and this principle has not been affected by the Judicature Acts and Rules. [He cited also *Molloy* v. *Kilby*. (11)]

Cur. adv. vult.

(1) (1886) 18 Q. B. D. 193.
(2) [1891] 2 Q. B. 241.
(3) (1884) 26 Ch. D. 35.
(4) Order XXXI., r. 12: "Any party may, without filing any affidavit, apply to the Court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. . . . ."
(5) (1876) 4 Ch. D. 92.
(6) (1875) 33 L. T. 322.
(7) (1880) 5 C. P. D. 194.
(8) (1888) 57 L. J. (Ch.) 498.
(9) (1825) 3 Sim. 64.
(10) (1802) 7 Ves. 287.
(11) (1880) 15 Ch. D. 162.

C. A. 1897

SPOKES v. GROSVENOR HOTEL CO.

May 27. A. L. SMITH L.J. read the following judgment:—This is an appeal against an order of Day J. ordering the West End and Grosvenor Railway Terminus Hotel Company to make an affidavit stating what documents are or have been in their possession or power relating to the matter in question in the action. The question is whether the learned judge had jurisdiction to make the order, for if he had, I do not doubt, upon the facts before us, that his discretion was well exercised.

The action is brought by a shareholder, on behalf of himself and other the shareholders in the hotel company against its directors and certain tradesmen of the company, to recover for the company the damages they are said to have sustained by reason of their directors and the tradesmen having, as it is alleged, conspired together to cheat and defraud the company, whereby the company have been damnified.

The proper plaintiffs in such an action would obviously be the company; but in the circumstances existing this is not possible, for the impeached directors who have the controlling power in the company do not assent to the company being made plaintiffs, and without that assent the company cannot be made plaintiffs.

To obviate this difficulty it has for many years been the practice of the Court of Chancery, in circumstances such as the present, to make the company parties to the action as defendants, in which action the plaintiff shareholder asks for an order, not that the damages recovered should be paid to him, but to the defendant company; and in this way the otherwise insuperable difficulty of maintaining the action is got over.

This is what has been done in the present case; and the order for discovery at the instance of the plaintiff shareholders against the company as being party to the action has been made by Day J.

That in the circumstances of this case the company are necessary parties to the suit I do not doubt, for without the company being made a party to the action it could not proceed. The point is now taken, not by the company, but in truth and in fact by the impeached directors, that as no relief is asked against the company, they cannot be put under discovery, and

some cases have been cited in support of this proposition which shew that a person who is a mere witness cannot be made a party to the suit in order to obtain discovery from him.

This is not what has been done in the present case. The order under which Day J. has acted is Order XXXI., r. 12, of the Rules of the Supreme Court, which is as follows: "Any party may . . . . apply to the Court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents in his possession and power." Why is not the company an "other party" within this rule? The company are defendants in the action in order that the action may be maintained, and to my mind are clearly a necessary party, which a mere witness certainly is not. It is said that this Court in *Shaw* v. *Smith* (1) has held that the company in a case like the present are not within the order, for, to constitute an "other party" within the meaning of the order, there "must be some right to be adjudicated upon" in the action between the company and the plaintiff, per Lord Esher, or "some community of interest," per Lindley L.J., or "some question in conflict in the action," per Lopes L.J. These judgments were given in a case, not where discovery was sought between a plaintiff and a necessary defendant, but where a question of discovery arose between two defendants in an action, which was a wholly different matter.

No case has been cited in which Order XXXI., r. 12, has been construed as above between a plaintiff and a defendant who is a necessary party to an action, and I think the rule upon its true construction in a case like the present gives the jurisdiction to order discovery of documents, and that Day J.'s order must, therefore, be upheld.

CHITTY L.J. read the following judgment:—This is an appeal by the defendant hotel company, or in their name, from an order made by the judge in chambers on the application of the plaintiff, whereby the appellants were ordered to make the usual affidavit of documents relating to the matters in question in the action.

(1) 18 Q. B. D. 193.

C. A. 1897

SPOKES v. GROSVENOR HOTEL CO.

Chitty L.J.

The action is brought by a shareholder on behalf of himself and other the shareholders in the company. It is founded on an alleged wrong done to the company. For such a wrong the company alone can sue at law, and the general rule is the same in equity (see *MacDougall* v. *Gardiner* (1)). But equity has admitted certain exceptions to the general rule, one of which is that where a fraud is committed by persons commanding a majority of votes the minority can sue by a shareholder. The principle of the exception is well illustrated by such cases as *Atwool* v. *Merryweather* (2), decided by Wood V.-C. in 1867; *Menier* v. *Hooper's Telegraph Works* (3), decided by James and Mellish L.JJ., and *Mason* v. *Harris* (4), decided by the Court of Appeal. As was said by Sir G. Jessel in the last-mentioned case, the reason for the exception is plain, for, unless it were allowed, it would be in the power of the majority to defraud the minority with impunity. On the allegations made in the statement of claim this case falls within *Mason* v. *Harris*. (4) The substance of the case set up is a conspiracy on the part of the directors of the company and the manager and certain tradesmen to defraud the company by commissions, excessive charges for goods supplied, charges for goods not supplied, and other means; that the company have in fact been thereby defrauded; and that the persons implicated in the fraud have obtained the control of the company and a majority of votes, rendering it impossible to bring the action in the name of the company. The directors and others charged with the fraud are defendants.

To such an action as this the company are necessary defendants. The reason is obvious: the wrong alleged is done to the company, and the company must be party to the suit in order to be bound by the result of the action and to receive the money recovered in the action. If the company were not bound they could bring a fresh action for the same cause if the action failed, and there were subsequently a change in the board of directors and in the voting power. Obviously, in such an action as this is, no specific relief is asked against the com-

(1) (1875) 1 Ch. D. 13.
(2) L. R. 5 Eq. 464, n.
(3) (1874) L. R. 9 Ch. 350.
(4) (1879) 11 Ch. D. 97.

pany; and obviously, too, what is recovered cannot be paid to the plaintiff representing the minority, but must go into the coffers of the company. It was argued for the appellants that the company were made a party for the purpose of discovery only, and authorities were cited to shew that when no relief is asked against a party he cannot or ought not to be compelled to make discovery. But this argument and these authorities have no bearing on the present case, where, as already shewn, the action cannot proceed in the absence of the defendant company, and the defendant company are interested in and will be bound by the result.

The order complained of was made under rule 12 of Order XXXI. That rule speaks of "other party": an order for discovery may be made against "any other party to any cause." It was argued for the appellant that the company were not "any other party" within the meaning of the rule, and the decision of this Court in *Shaw* v. *Smith* (1) was relied upon in support of the argument. That case is clearly distinguishable. The question there was between co-defendants, and not, as here, between the plaintiff and a defendant. What the Court was there considering was whether the term "any other party" meant "opposite party" (the expression used in the first rule of the same order), and whether it ought to be cut down so as to apply only to a party on the other side of the record. The Court held that it ought not. I am of opinion that this case falls within the express provisions of the rule in question, and that there was jurisdiction to make the order.

But then it was urged that upon the merits disclosed, and in the exercise of a sound discretion, the order ought not to have been made. The defendant company produced an affidavit before us to shew that the action was not an honest suit brought in the interest of the minority of shareholders, but was brought in the interest of a rival hotel company for the purpose of obtaining an insight into the defendant company's mode of business. If such a case had been made out, or a good ground shewn for believing it to be true, I should have agreed that the discovery ought not to have been granted. But the case set

(1) 18 Q. B. D. 193.

C. A. 1897

SPOKES v. GROSVENOR HOTEL CO.

Chitty L.J.

up was entirely displaced by an affidavit produced by the plaintiff, which shews that the action is brought at the instance of a respectable minority, and that the ostensible purpose is the real purpose for which the action is brought. Shareholders representing the minority have applied to the Board of Trade under the 56th and following sections of the Companies Act, 1862, for an investigation into the affairs of the company in relation to matters involved in the action, and the Board of Trade, being satisfied that the applicants have shewn good reason for the investigation and that they are not actuated by malicious motives, have appointed an inspector. An attempt was made before us some short time ago by the directors, in the company's name, to stop or embarrass the proceedings before the inspector, but it wholly failed. The present appeal is brought in the name of the company, but (as was necessarily admitted by the appellants' counsel) on the instructions of the directors, who are charged with a fraud. It is the directors' appeal in the name of the company. The directors alone have the control of all the company's proceedings in the suit. This exceptional form of action has been allowed by the Court for the purposes of justice, and it is important to maintain the principle on which it is founded. What the minority is asking for is a discovery of the documents in the possession or control of the company of which they are members. To refuse the discovery would tend to defeat actions of this class, or to impair their efficiency to a considerable extent.

For these reasons I think that the appeal should be dismissed.

LORD ESHER M.R. I say nothing.

Appeal dismissed.

May 24. *Pollard*, for the defendant Drew. The only cause of action is conspiracy, and the defendant under the old Chancery practice could not have been called on to answer questions which might subject him to pains, penalties, or forfeitures: *East India Co.* v. *Campbell* (1); *Chetwynd* v.

(1) (1749) 1 Ves. Sen. 246.

Lindon (1); *Cartwright* v. *Green* (2); *Paxton* v. *Douglas* (3); *Maccallum* v. *Turton*. (4) The same principle is carried out under the Judicature Acts: *Redfern* v. *Redfern*. (5) The case of *Allhusen* v. *Labouchere* (6) was on interrogatories, and does not apply to discovery of documents.

J. Eldon Bankes, for the plaintiff. The only objection that can be taken by the defendant is that the production of the documents might tend to criminate him, and this fact shews that the objection must be taken on oath in the affidavit. There is no authority to shew that the objection can be taken to the question being put. *Redfern* v. *Redfern* (5) was decided on the ground that the question desired to be put as an interrogatory was inadmissible under the provisions of a statute. The rules applicable in this respect to interrogatories will apply equally to discovery of documents, and there are authorities that in both cases the objection must be taken when the answer is made upon oath: *Fisher* v. *Owen* (7); *Allhusen* v. *Labouchere* (6); *Webb* v. *East* (8); *Seaward* v. *Dennington*. (9)

Pollard, in reply. The cases already cited, and others that could be cited, shew that the objection in Chancery proceedings was taken on demurrer, and that the defendant was not called on to raise it by answer. The defendant is, therefore, entitled to object to the question, and is not bound to wait until he makes the affidavit of documents.

LORD ESHER M.R. In this case an action has been brought in which the present appellant is charged with conspiring with other defendants to defraud the defendant company. A summons has been taken out calling on him to make an affidavit of documents. The meaning of that is that he shall state in an affidavit what documents he has relating to the issues in the action. He is asked a question as to those documents, and it is said on his behalf that the Court ought not to allow that question to be put. There is no question before us as to

(1) (1752) 2 Ves. Sen. 450.
(2) (1803) 8 Ves. 405.
(3) (1812) 19 Ves. 225.
(4) (1828) 2 Y. & J. 183.
(5) [1891] P. 139.
(6) (1878) 3 Q. B. D. 654.
(7) (1878) 8 Ch. D. 645.
(8) (1879) 5 Ex. D. 23.
(9) (1896) 44 W. R. 696.

C. A. 1897

SPOKES v. GROSVENOR HOTEL CO.

Lord Esher M.R.

whether the defendant can decline to answer; the question is whether we can say that he should not be called upon to answer. I think we are bound by the authority of *Allhusen* v. *Labouchere* (1) to say that the question may be put. In that case, James L.J. says (2): "Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime. . . . Of course he would not be obliged to answer such questions, but the questions were put, and could not be objected to." In my own judgment I said (3): "I take that decision (*Fisher* v. *Owen* (4)) to be that where interrogatories are relevant, although the answer to them might criminate the person answering . . . . they must nevertheless be allowed, and he must himself elect whether he will answer them or not"; and Cotton L.J. stated (5) that the practice is universal that it is no objection to an interrogatory, if relevant, that the answer might tend to criminate the party to whom it is exhibited. It is said that this is confined to interrogatories; but I cannot see any distinction between questions such as are asked in the present case and questions put by way of interrogatories. It seems to me that case is a distinct authority that the objection by the person called on to make an affidavit of documents that the disclosure of the documents may tend to criminate him cannot be taken to the summons for discovery of documents, but that the objection can only be taken in the affidavit in answer.

It is said that this decision, which was given in 1878, is in conflict with *Redfern* v. *Redfern* (6), which was decided in 1890; but this latter case was decided on the particular provisions of the Divorce Acts, and is not an authority as to the general law of discovery. The authority of the case I have cited is binding and conclusive to shew that the objection cannot be taken at this stage of the case. The appeal must, therefore, be dismissed.

(1) 3 Q. B. D. 654.
(2) 3 Q. B. D. at p. 660.
(3) 3 Q. B. D. at p. 661.
(4) 8 Ch. D. 645.
(5) 3 Q. B. D. at p. 666.
(6) [1891] P. 139.

A. L. SMITH L.J. This is an action in which the plaintiff seeks to recover damages from the present appellant and others, who were directors of a company, for conspiring together to defraud the company. The plaintiff obtained an order for discovery of documents—that is, that Drew should state on oath what documents are in his possession relevant to the issues in the action. It is argued that such an order ought not to be made because the charge is one of conspiracy, and no person ought to be called on to criminate himself.

In my opinion the rule on this point is the same whether the discovery sought is of facts or of documents. The rule, so far as my memory goes, has been uniform that the objection that the discovery may tend to criminate, whether the discovery is of documents or facts, must be taken in answer, and not as an objection to the putting of the question. There are a series of cases, among which are *Fisher* v. *Owen* (1); *Allhusen* v. *Labouchere* (2); *Webb* v. *East* (3); *Seaward* v. *Dennington*. (4) Two of these cases deal with discovery of documents and two with discovery by interrogatories. In all of them it was held that the time to take the objection is when the answer is made upon oath.

There is no case to throw doubt on this sequence of authority except *Redfern* v. *Redfern* (5), which was an appeal from the Divorce Court, in which it was pointed out by Lindley L.J. that the incriminating question could not be asked, and, inasmuch as the sole document of which discovery was sought was an incriminating one, the Court came to the conclusion that the discovery should not be granted. That did not overrule the series of cases to which I have referred, and does not form a precedent against the general rule of practice.

CHITTY L.J. I am of the same opinion. I think the case is governed by *Allhusen* v. *Labouchere* (2) and the other authorities which have been cited. There are two methods of obtaining discovery, one of them by means of interrogatories,

(1) 8 Ch. D. 645.
(2) 3 Q. B. D. 654.
(3) 5 Ex. D. 23.
(4) 44 W. R. 696.
(5) [1891] P. 139.

C. A. 1897

SPOKES v. GROSVENOR HOTEL CO.

Chitty L.J.

and the other by discovery of documents. So far as the question raised in this appeal is concerned, I think there is no difference between these methods. In the case of interrogatories it has been established that an objection that to give the discovery sought might tend to incriminate the person called on must be taken in the affidavit in answer. In the case of documents the defendant may not care to raise the objection in his answer, or he may have documents not covered by the privilege, or he may claim that he is not called on to discover the documents; but in that case he must do so in his affidavit in answer. I agree with the observations that have been made upon the case of *Redfern* v. *Redfern* (1), which turned upon the law of divorce. As the person charged with adultery could not under that law have been asked questions tending to shew criminality, it was right that the putting of such questions should be stopped. No such objection can be raised here, and the case affords no precedent for the application now made.

Appeal dismissed.

Solicitors for plaintiff: *Henry D. Kimber & Co.*
Solicitors for defendants: *Mossop & Rolfe.*

(1) [1891] P. 139.

A. M.

RUYS *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

1897
May 24, 31.

Marine Insurance—Capture—Notice of Abandonment—Recovery of Ship after Action brought—Total Loss.

A ship, insured under a policy covering war risks, was, whilst carrying contraband of war destined for one of two belligerent governments, captured by a cruiser belonging to the other. Thereupon the shipowners gave to the underwriters notice of abandonment, which was refused; and shortly afterwards they commenced an action on the policy. Subsequently, the war being at an end, the prize court of the captors decreed the ship to be returned to her owners :—

Held, that the return of the ship after the commencement of the action did not disentitle the owners to recover as for a total loss.

Further Consideration before Collins J.

The plaintiffs were the owners of a ship called the *Doelwyk*, which, on August 7, 1896, they insured with the defendants under a valued policy against war risks. The Italian Government was at that time at war with the King of Abyssinia. On August 8 the *Doelwyk*, which was carrying a cargo of arms and ammunition intended for the King of Abyssinia, was captured by an Italian cruiser. On August 14 the plaintiffs gave the defendants notice of abandonment of the ship, which was refused. On August 21 they commenced this action on the policy. On December 8 the Italian Prize Court declared the ship to be lawful prize, but, the war being at an end, ordered her to be restored to her owners. The question of the effect of such restoration after action brought upon the plaintiffs' right to recover upon the policy was reserved by the judge at the trial for further consideration.

Sir R. T. Reid, Q.C., Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. The principle of insurance is indemnity: *Godsall* v. *Boldero* (1); and an indemnification, even though by a third party, is a good defence to an action on the policy. It ought to be none the less a defence because the indemnification occurred after the commencement of the action.

(1) (1807) 9 East, 72.

1897

RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION.

The old plea puis darrein continuance, which is preserved by Order XXIV., r. 1, is as much applicable to an action on a policy as to any other action. It is at the option of the plaintiff to say at what time the writ shall issue, and it is impolitic therefore to make the issue of the writ the date at which the rights of the parties are to be determined. Then as to authority. Though there are cases in which dicta occur to the effect that restoration of a captured ship before action brought will take away the assured's right to recover as for a total loss, in none of those cases (with one exception) was there anything to shew an intention on the part of the judges to limit their proposition to a restoration before action brought, for the facts did not raise the present question as to the effect of a restoration after action brought and before trial. Indeed, Lord Mansfield in *Hamilton* v. *Mendes* (1), and Bayley and Abbott JJ. in *Brotherston* v. *Barber* (2), expressly left the point open. The one exception is *Rodocanachi* v. *Elliott* (3), where it was held in the Exchequer Chamber that an indemnification after action brought will not affect the assured's right to recover on the policy. But there the question was not argued. In *Rankin* v. *Potter* (4) Blackburn J. treats a change of circumstances happening "before the trial" as of the same effect as a similar change of circumstances happening before action brought.

Bigham, Q.C., and *Scrutton*, for the plaintiffs. The plaintiffs are entitled to recover as for a total loss. No doubt the contract of insurance is one of indemnity, but here the policy is valued and the amount of the indemnity is agreed. The rights of the parties must be fixed at some time or other. If that time is not to be the date of notice of abandonment—and it is well settled that it is not—there seems to be no reason in principle why it should be the date of the trial more than that of the writ. The effect of the plaintiffs' contention is only to give them the same rights as if the trial took place at the date of the writ. In the notes to Bullen and Leake, 3rd ed. p. 451 (*d*), it is said that "Throughout the ordinary pleadings in an action

(1) (1761) 2 Burr. 1198, at p. 1214.
(2) (1816) 5 M. & S. 418, at pp. 424, 426.
(3) (1874) L. R. 9 C. P. 518.
(4) (1873) L. R. 6 H. L. 83, at p. 127.

the rights of the parties are considered to remain the same as they were at the commencement." There are numerous dicta that the material point of time when the rights of the parties are fixed is the commencement of the action: *Bainbridge* v. *Neilson* (1); *Patterson* v. *Ritchie* (2); *Cologan* v. *London Assurance Co.* (3); per Lord Ellenborough, *Brotherston* v. *Barber*. (4) And that proposition is treated as settled law in Arnould on Marine Insurance, 6th ed. vol. 2, pp. 763, 970. The case of *Rodocanachi* v. *Elliott* (5) is a direct authority in the plaintiffs' favour, and it seems clear from the report in the *Law Times* (6) that the point was argued by counsel. The dictum of Blackburn J. to the contrary in *Rankin* v. *Potter* (7) was probably per incuriam, for he relied for his proposition upon *Dean* v. *Hornby* (8), which does not support it.

J. A. Hamilton, in reply.

Cur. adv. vult.

COLLINS J. This was an action to recover for a total loss of the ss. *Doelwyk* by capture on a valued policy covering war risks. The steamer, which was carrying a cargo of arms and ammunition destined for the King of Abyssinia, who was then at war with the Italian Government, was captured by an Italian cruiser on August 8, 1896. On August 14 notice of abandonment was given by the plaintiffs and refused by the underwriters, and on August 21 the writ in this action was issued. The defendants set up concealment and other defences, and at the trial before me with a special jury on April 14 last a verdict passed for the plaintiffs on these issues. It was, however, contended that, by reason of what had happened after the commencement of the action and before trial, the plaintiffs could not recover as for a total loss, and that question has accordingly been argued before me. After the date of the writ the vessel was taken before a prize court at Rome, which, on December 8 following, pronounced that she was lawful prize. The war, however, being then over, it did not decree the

(1) (1808) 10 East, 329, at p. 345.
(2) (1815) 4 M. & S. 393, at p. 397.
(3) (1816) 5 M. & S. 447, at p. 455.
(4) 5 M. & S. 418, at p. 423.
(5) L. R. 9 C. P. 518.
(6) (1874) 31 L. T. 239.
(7) L. R. 6 H. L. 83, at p. 127.
(8) (1854) 3 E. & B. 180.

1897

RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION.

Collins J.

confiscation of the ship or cargo, and she has since been taken over under an arrangement with the underwriters for the benefit of all concerned. Can the defendants rely on these facts occurring after action as diminishing their liability, or must the rights of the parties be ascertained as at the date of the writ? The state of the authorities appears to be as follows. In *Hamilton* v. *Mendes* (1) news of the capture and recapture of the ship reached the assured at the same time. He thereupon gave notice of abandonment, which the underwriters rejected. Lord Mansfield held that he could not recover. He says (2): "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification as it really is *at the time the action is brought*. It is repugnant, upon a contract of indemnity, to recover as for a total loss when the final event has decided that the damnification in truth is an average, or perhaps no loss at all." Later on he says (3): "I desire it may be understood, that the point here determined is that the plaintiff upon a policy can only recover an indemnity according to the nature of his case *at the time of the action brought*, or, at most, at the time of his offer to abandon. We give no opinion how it would be in case the ship or goods be restored in safety between the offer to abandon and the action brought, or between the commencement of the action and the verdict. And particularly I desire that no inference may be drawn that in case the ship or goods should be restored after the money paid as for a total loss the insurer could compel the insured to refund the money and take the ship or goods; that case is totally different from the present, and depends throughout upon different reasons and principles." In *Bainbridge* v. *Neilson* (4) news of capture had been received and notice of abandonment given after the ship had been in fact recaptured unknown to the assured. The principle of Lord Mansfield's decision was held by Lord Ellenborough and the rest of the Court to cover this case; but the commencement of the action is again taken as the governing date: see particularly per Grose J. The principle was carried one step further in

(1) 2 Burr. 1198.
(2) At p. 1210.
(3) 2 Burr. at p. 1214.
(4) 10 East, 329.

Patterson v. *Ritchie* (1), decided by the same Court in 1815, where the recapture took place after abandonment but before action. Here, again, the date of the commencement of the action is emphasised. A like decision was given on similar facts in the following year in *Brotherston* v. *Barber*. (2) And Bayley and Abbott JJ. both point out that the decision does not cover the case of recapture after action. In *Cologan* v. *London Assurance Co.* (3), where, notwithstanding recapture after abandonment and before action it was held under the special circumstances that the assured could recover for a total loss, Lord Ellenborough says (4): "Where there has been a total loss and an abandonment, we must look to the situation of things *before action brought*, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment." *Holdsworth* v. *Wyse* (5) was very similar in its facts, but nothing special was said about the commencement of the action. Meanwhile, in 1814, before *Patterson* v. *Ritchie* (1) was decided, in *Smith* v. *Robertson* (6), a Scottish appeal, Lord Eldon had expressed some doubt as to the decisions, in *Bainbridge* v. *Neilson* (7) and *Falkner* v. *Ritchie* (8), pointing out the far-reaching consequences to which they might be pressed. The Court of Queen's Bench, however, in *Patterson* v. *Ritchie* (1), adhered to their former decisions. In this condition of the authorities Lord Tenterden, in *Naylor* v. *Taylor* (9) says: "If the abandonment is to be viewed with regard to the ultimate state of facts as appearing *before the action brought*, according to the opinion of the Court in *Bainbridge* v. *Neilson* (7), there has not been, for the reasons already given, a total loss." He then refers to Lord Eldon's doubts as to that case, and goes on: "But, notwithstanding those doubts, the rule as laid down in *Bainbridge* v. *Neilson* (7) was adopted and acted upon by the Court in the two subsequent cases of *Patterson* v. *Ritchie* (1) and *Brotherston* v. *Barber*. (2) We

(1) 4 M. & S. 393.
(2) 5 M. & S. 418.
(3) 5 M. & S. 447.
(4) At p. 454.
(5) (1828) 7 B. & C. 794.
(6) (1814) 2 Dow, 474, at p. 477.
(7) 10 East, 329.
(8) (1814) 2 M. & S. 290.
(9) (1829) 9 B. & C. 718, at p. 724.

1897

RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION.

Collins J.

consider the point to have been well settled, and the rule established by these authorities." Clearly, therefore, he regards these cases as establishing the commencement of the action as the crucial date. From that date onwards I cannot find that the point which I have to decide was ever mooted. On the contrary, in the subsequent cases of *Dean* v. *Hornby* (1) and *Lozano* v. *Janson* (2), the consideration was limited to what had happened up to the date of action; and in *Rodocanachi* v. *Elliott* (3), though the facts as stated in the special case admitted of the point being raised, it does not seem to have been specifically made. A point, however, was made in the argument in the Exchequer Chamber, based in part on a fact arising after action, and the answer given to it by Bramwell B., would be equally an answer to the present contention. There the plaintiffs had insured silks, on a journey partly by sea and partly by land, from Shanghai to London. The policy covered war risks. The goods got as far as Bercy on their journey across France on September 13, but, owing to the investment of Paris by the Germans, the further transit to London became impossible up to and for a long time after the commencement of the action. Notice of the abandonment was given on October 7, and the action begun shortly afterwards. Meanwhile, on September 2, the plaintiffs had sold the silks to arrive in London on the terms that the prompt should be four months from making, and that in the event of the silks not arriving the contract was to be null and void. After the commencement of the action and before trial the silks arrived in London undamaged, and were taken to by the purchasers. The argument on this point is not reported in the LAW REPORTS (4); but it appears from the *Law Times* report (5) that the defendant contended that the plaintiffs, having before abandonment sold the goods to arrive to a buyer who subsequently took them, were not in a condition to abandon, as they had already parted with all interest in the goods. To this argument Bramwell B. is reported to have said: "This point, which was not made below, divides

(1) (1854) 3 E. & B. 180.
(2) (1859) 2 E. & E. 160.
(3) (1873) L. R. 8 C. P. 649.
(4) L. R. 9 C. P. 518.
(5) 31 L. T. (N.S.) 239.

itself into two. First, could the plaintiffs abandon? Secondly, assuming that they could, *would the fact of the vendees subsequently taking possession alter the effect of the abandonment?*" Afterwards, in giving the considered judgment of the Court, he thus deals with it (1): "The first point made by the defendant in the argument before us very faintly, and not at all in the Court below, was that supposing there was a loss within the policy there was no right of abandonment, the plaintiffs having sold the goods insured and the vendees having claimed them on their arrival. The answer is that if the plaintiffs had the right of abandonment and did abandon, the abandonees, the underwriters, thereby acquired all the rights of the assured, *including their right to the price of the goods from the vendees.*" This, therefore, is an express decision, pointed by the observation made during the argument —that matter arising after action will not defeat an abandonment made before action, but must be dealt with according to the rights of the parties under the abandonment. It is true and significant that the able counsel for the defendants, Mr. Day and Mr. J. C. Mathew, did not in terms raise the point except as supporting the contention that the assured had nothing to abandon. But Bramwell B. analyzed it, and dealt with it as above stated. The only other authority referred to by the defendants in support of their contention before me was an expression of Lord Blackburn in his opinion given in the House of Lords in *Rankin* v. *Potter*. (2) He there uses the following language: "Even in the case where the loss is at the time of the notice of abandonment total, though capable of being reduced by change of circumstances to a partial loss, the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss if that change of circumstances does occur before the trial." In support of this statement he cites *Dean* v. *Hornby* (3), which certainly does not carry the principle he is enunciating beyond the date of action. The case was argued and decided on the footing that all that happened after action was immaterial, whether as a matter of law

(1) L. R. 9 C. P. 518, at p. 520. (2) L. R. 6 H. L. 83, at p. 127.
(3) 3 E. & B. 180.

1897

RUYS v. ROYAL EXCHANGE ASSURANCE CORPORATION.

Collins J.

or as the result of an arrangement between the parties does not signify. The case does not support the proposition, unless "trial" is used as equivalent to "action." I cannot, therefore, regard this dictum as an authority for the defendants. I have now, I think, exhausted the authorities. The text-writers, without exception so far as I know, treat it as settled law that the rights of the parties must be ascertained as at the date of the action brought: see Arnould, passim; Phillips, par. 1704. No doubt there is a logical difficulty in drawing the dividing line where the safe position of abandonment on good grounds subsisting at the time of notice has been given up, and much might be said for the view suggested by Lord Eldon and adopted in the American and other systems, that the rights of the parties should be finally ascertained upon a proper abandonment. But, the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained, and the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years (see this point well treated: Arnould, vol. i. p. 15, 6th ed.). The peculiar nature of the contract of insurance and the reciprocal rights acquired and given up by abandonment may account for the fact that it has never been attempted in these cases to make circumstances mitigating the loss after action a ground of plea puis darrein continuance or to the further maintenance of the action. I am certainly not disposed to carry a step further, even though logic demanded it, a principle which was not approved by Lord Eldon, which has not commended itself to foreign nations, and which was carried, I think, to the utmost limit of convenience in *Patterson* v. *Ritchie* (1) and *Brotherston* v. *Barber*. (2) My judgment is, therefore, for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Hollams, Coward & Hawksley.*

(1) 4 M. & S. 393. (2) 5 M. & S. 418.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1897
May 21;
June 3.

THORNTON *v.* FRANCE AND OTHERS.

Statute of Limitations—Mortgage—"Person claiming under a Mortgage"—Possession adverse to Mortgagor—Real Property Limitation Act, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 28).

In 1886 the owner of one undivided moiety of premises, which had been during the previous eleven years in the sole possession of the owners of the other moiety, mortgaged his moiety; and in 1890, the premises having in the meantime continued and still continuing to be in the sole possession of the owners of the other moiety, he executed a conveyance of his moiety, subject to the mortgage, to the plaintiff, who subsequently paid off the mortgage:—

Held, that the plaintiff did not, on paying off the mortgage, become a "person claiming under a mortgage" within the meaning of the Real Property Limitation Act, 1837, which, as modified by the Real Property Limitation Act, 1874, s. 9, gives such a person a period of twelve years from the last payment of any part of the principal money or interest secured by the mortgage for bringing an action to recover the land:—

Held, also, that the Real Property Limitation Act, 1837, does not confer a new right of entry on the mortgagee where at the date of the mortgage a person is in possession adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor.

Doe v. *Massey*, (1851) 17 Q. B. 373, distinguished and considered.

APPEAL from the judgment of Grantham J. at the trial before him without a jury.

The action, which was commenced on July 25, 1896, was for a declaration that the plaintiff was entitled, as tenant in common in fee, to an equal undivided moiety of premises called the Foresters' Arms and the land and outbuildings thereto belonging, and the rights of way and other privileges enjoyed therewith, and for a partition in accordance with such declaration. Upon a plan put in at the trial, and admitted to be substantially correct, the premises in respect of which the action was brought were denoted by the colour green, and another adjoining property of about the same size was denoted by the colour yellow, that property consisting of a cottage described as Hallas' Cottage with garden and land belonging thereto. At the time of action brought, the plaintiff was in

C. A. 1897

THORNTON v. FRANCE.

possession of the property coloured yellow, and the defendants were in possession of the property coloured green on the plan. The defendants in their defence pleaded possession, and set up the Statute of Limitations; and also pleaded that the entirety of the property shewn on the plan was in or about 1856 vested in the three daughters of one Thomas Senior and in one Harriet Hallas, as tenants in common in fee, and that in or about 1856 they agreed to effect and did effect a partition, by virtue of which the premises coloured green became vested in severalty in the three daughters of Thomas Senior, and were exclusively held and occupied by them and their successors in title in severalty until 1893, when their estate therein was conveyed to Joel France (since deceased), who devised the same to the defendants. In the alternative, in the event of their defence failing, the defendants counter-claimed that they were entitled as tenants in common with the plaintiff in fee to the property denoted by the colour yellow, and a partition thereof. By his reply the plaintiff denied the title of the defendants to that property.

The facts with regard to the documentary title to the two properties, coloured green and yellow respectively, and the occupation of them were, so far as material to this report, as follows. In 1834 Susannah Senior purchased a piece of land, which by her direction was conveyed to her for life with remainder as to one undivided moiety thereof to the use of her son Thomas (the predecessor in title of the defendants) during his life, and after his decease to the use of his heirs and assigns for ever, and as to the other undivided moiety thereof to the use of her daughter Harriet Hallas (the predecessor in title of the plaintiff), and after her decease to the use of her heirs and assigns for ever. In 1835, or 1836, Susannah Senior built on the land two cottages, and, when they were finished, she placed her son Thomas in possession of one of them (for which he afterwards obtained a licence and which became the Foresters' Arms) and the land thereto belonging, and placed her daughter Harriet Hallas in the possession of the other cottage, known as Hallas' Cottage, and the garden and land thereto belonging. Susannah Senior died in 1856. Thomas Senior died in 1853 in

the lifetime of his mother, intestate, leaving three daughters his co-heiresses, and the learned judge found on the evidence that they continued in exclusive possession of the Foresters' Arms and land thereto belonging till February 14, 1893. By deed of that date the co-heiresses conveyed all their estate and interest in the Foresters' Arms and the land thereto belonging to Joel France, since deceased, whose devisees the defendants were. On April 8, 1865, Harriet Hallas executed a deed conveying her undivided moiety of the entirety of the property shewn on the plan to persons named Hathorn and Owen by way of mortgage, and in 1866 they transferred the mortgage to Owen and Stocks. On February 17, 1875, William Hallas, who was the heir of the mortgagor, Harriet Hallas, she having died in 1873, intestate, executed a deed conveying his undivided moiety of the entirety of the property to William Henry Thornton in fee, and Owen, the transferee of the mortgage (Stocks being then dead), joined in the conveyance for the purpose of receiving the mortgage money and passing the legal estate. On June 11, 1886, William Henry Thornton mortgaged this undivided moiety to Joe Robinson. In June, 1890, William Henry Thornton sold his equity of redemption to the plaintiff, and by deed dated June 24, 1890, he conveyed to the plaintiff in fee his undivided moiety in the entirety subject to the mortgage to Robinson. It was alleged by the plaintiff and not disputed that in or about 1892 the plaintiff had paid off this mortgage, but he did not obtain a reconveyance from Robinson before the trial. At the trial the plaintiff asked leave to amend by adding Robinson as a co-plaintiff, he being willing to be added, but the learned judge refused to allow the amendment. It was stated on the argument of the appeal that since the trial the plaintiff had obtained a reconveyance from Robinson. The learned judge found upon the evidence that there had been separate possession of the two properties respectively—that is to say, of the green by the defendants and their predecessors in title, and of the yellow by the plaintiff and his predecessors in title for fifty or sixty years; and he gave judgment for the defendants on the ground that the plaintiff's title to the property coloured green was barred by the Statute of Limitations.

C. A. 1897

THORNTON v. FRANCE.

May 21. *Scott Fox*, and *R. Younger*, for the plaintiff. The plaintiff's title to an undivided moiety of the land coloured green on the plan has not been defeated either by the twenty years' limitation under the Real Property Limitations Act, 1833 (3 & 4 Will. 4, c. 27), or by the twelve years' limitation under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). Harriet Hallas' right of entry did not accrue till the death of her mother, Susannah Senior, in 1856. In 1865, when only about nine years had run against her, she mortgaged to Hathorn and Owen; and the plaintiff contends that thereupon, by virtue of the Real Property Limitation Act, 1837 (7 Will. 4 and 1 Vict. c. 28) (1), the Statute of Limitations ceased running as against the mortgagees or any persons claiming under them, and did not begin to run again against them as long as the interest on the mortgage was regularly paid. Then in 1875 the surviving transferee of the mortgage joined with the heir of Harriet Hallas in the conveyance of the property to William Henry Thornton, who consequently took the transferee's title. He was thus a person claiming under the mortgage within the Real Property Limitation Act, 1837; and therefore his title cannot be considered as having been barred in 1875. Similarly, when he mortgaged to Robinson in 1886 (the period of twelve years not having then run against him), thereupon, by virtue of the Act of 1837, the Statute of Limitations ceased running as against the mortgagee or any one

(1) 7 Will. 4 and 1 Vict. c. 28: "Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty, King William the Fourth, intituled 'an Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto' so far as the same relates to mortgages; and it is expedient that such doubts should be removed: Be it declared and enacted, that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty" [now twelve] "years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty" [now twelve] "years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding."

claiming under him, and did not begin to run again as long as the interest on the mortgage was regularly paid. The plaintiff having paid off the mortgage to Robinson, the latter has become a bare trustee for him, and he also is a person claiming under a mortgage within the Act of 1837, and his title as such is consequently not statute-barred. In *Doe* v. *Eyre* (1) it was held that the mortgagee was not barred, although the mortgagor and mortgagee together had been out of possession for more than twenty years, and Lord Campbell C.J. said in reference to the effect of the Act of 1837: "A case may be put, where a person who has occupied as tenant by sufferance nearly twenty years, without payment of rent or written acknowledgment, might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises and going on, for a great many years afterwards, paying interest to the mortgagee. But it cannot be considered to have been the object of the Legislature to protect the interest of such a person. The mortgagor certainly may, in some cases, gain a consequential advantage by our construction of the statute, although it was passed for the security of mortgagees. Still, without this, the security intended to be given to mortgagees cannot be enjoyed." The decision in the case of *Doe* v. *Massey* (2) is directly in favour of the plaintiff. It was there held that, where, on a purchase of lands which were under mortgage, the purchaser paid the principal and interest due on the mortgage, and took a conveyance, in which the mortgagor and mortgagee joined, of the premises and of the mortgagor's equity of redemption and all the residue of his interest, the purchaser was a person "claiming under" a mortgage within the Real Property Limitation Act, 1837, and that the twenty years' limitation under the Real Property Limitations Act, 1833, ran from the paying off of the mortgage and interest. The learned judge should have allowed an amendment by adding Robinson as a co-plaintiff, that being mere matter of form.

[They also cited *Ford* v. *Ager* (3); *Chinnery* v. *Evans*. (4)]

(1) (1851) 17 Q. B. 366.
(2) 17 Q. B. 373.
(3) (1863) 2 H. & C. 279.
(4) (1864) 11 H. L. C. 115.

C. A. 1897

THORNTON v. FRANCE.

Swinfen Eady, Q.C., and *H. Manisty*, for the defendants. The proper inference from the evidence is that there was an agreement for a partition of the property included in the deed of 1834 between Thomas Senior and Harriet Hallas as far back as 1836, the mother, Susannah Senior, surrendering her life interest for that purpose. The learned judge has found upon the evidence that there has been separate possession of the two properties respectively all that time, and there is authority for drawing such an inference as that contended for under such circumstances: see *Tidball* v. *James* (1) and *Murphy* v. *Murphy*. (2) If the inference of a partition during the mother's lifetime is inadmissible, at any rate the inference should be drawn of a partition on her death in 1856.

The plaintiff's title is in any case barred by the Statutes of Limitation (3 & 4 Will. 4, c. 27, ss. 2, 12, and 37 & 38 Vict. c. 57, s. 1). The plaintiff ought not under the circumstances to be allowed to amend by adding Robinson as co-plaintiff; and on the record as it stands he fails to shew any title. His only title was derived from the mortgagor, W. H. Thornton, and that title was clearly barred. Assuming he could have got a good title from Robinson, the mortgagee, he had not done so. Furthermore, any amendment would be unavailing. The Real Property Limitation Act, 1837, was passed for the protection of mortgagees, and persons claiming under a subsisting mortgage, from the apprehended effect upon their titles of the abolition of the doctrine of adverse possession by the Real Property Limitations Act, 1833, which had a retrospective operation; and it was not intended by the statute of 1837 to give to a mortgagee, or a person claiming under him, a fresh right of entry where none would have existed prior to the Act of 1833: see *Eyre* v. *Walsh* (3); *Heath* v. *Pugh*. (4) Before the Act of 1833, if there was possession adverse to the mortgagor at the date of the mortgage, the Statute of Limitations continued to run against the mortgagee; and the statute of 1837 does not in that case put him in a better position than his

(1) (1859) 29 L. J. (N.S.) (Ex.) 91.
(2) (1864) 15 Ir. C. L. Rep. 205.
(3) (1860) 10 Ir. C. L. Rep. 346.
(4) (1881) 6 Q. B. D. 345.

mortgagor. If, on the other hand, the possession was not adverse to the mortgagor, the statute would not have run against the mortgagee. The object of the statute of 1837 was to preserve to mortgagees, and those claiming under a mortgage, the position which they enjoyed before the Act of 1833, not to give them a better position; and for this purpose the question whether the possession was adverse as against the mortgagor may still be material. Here the judge has found adverse possession before the mortgage by Harriet Hallas in 1865. Upon the execution of a reconveyance by a mortgagee the mortgage is at an end, and the mortgagor cannot be considered as deriving title from the mortgagee. It was never intended that an owner of land should be able, by means of the Act of 1837, to protect himself from the operation of the Statutes of Limitation. If the construction which the plaintiff seeks to place upon the Act is correct, an owner of land whose title is almost barred by the statute has only to execute a mortgage for a small sum, and then pay it off, it may be, years afterwards, and take a reconveyance, and he will escape from the operation of the Statute of Limitations. The Act of 1837 is for the protection of the interest of a mortgagee or person claiming under a subsisting mortgage. It would therefore apply where a mortgagee or transferee of a mortgage remains such and claims under the mortgage, or sells under his power of sale. But the Act would not apply to a case where a mortgagor whose title is barred himself pays off the mortgage and then conveys, or where a person purchases the equity of redemption from him and then pays off the mortgage. In such a case the purchaser cannot be said to claim under the mortgage.

For the reasons already given, neither William Henry Thornton nor the plaintiff can be considered as a person claiming under a mortgage within the Real Property Limitation Act, 1837; and it cannot be denied that, unless that statute applies, the plaintiff must fail. William Henry Thornton must be regarded as deriving title only from the heir of Harriet Hallas, the mortgagor, and not from Owen, the transferee of the mortgage; and, similarly, the plaintiff must be regarded as

C. A. 1897

THORNTON v. FRANCE.

deriving title only from William Henry Thornton, and not from Robinson, the mortgagee. That being so, William Henry Thornton's title was barred when he mortgaged to Robinson, and Robinson derived no title from him. But, assuming that William Henry Thornton's title was not barred then, the plaintiff's title has been barred by the adverse possession since 1875. *Doe* v. *Eyre* (1) does not govern the present case, for there the action was by the mortgagee, and there was no adverse possession at the time when the mortgage was executed. *Doe* v. *Massey* (2) is also distinguishable on two grounds: first, because the question whether the possession was adverse at the date of the mortgage was never raised, and it would rather seem upon the facts that it was not adverse; and, secondly, because there the mortgagor and mortgagee joined in conveying simultaneously. In the present case the plaintiff merely purchased and took a conveyance of the equity of redemption from William Henry Thornton, and did not pay off the mortgage till 1892, at which time his title was already barred. It is merely like the case of a mortgagor whose title is barred subsequently paying off a mortgage, which it is submitted does not come within the Act of 1837. If *Doe* v. *Massey* (2) is not distinguishable, it is contended that it was wrongly decided, and it is not binding on the Court of Appeal.

Scott Fox, in reply. In *Eyre* v. *Walsh* (3) the occupier had acquired a title against the mortgagor by virtue of the Statute of Limitations before the Act of 1833, and all that was held in that case was that the Act of 1837 could not be meant to have the effect of recreating a title that was already barred at the passing of the Act of 1833. There cannot be any real distinction for this purpose between cases where the mortgagee joins in the conveyance for the purpose of receiving the mortgage money and conveying the legal estate, as was the case in *Doe* v. *Massey* (2), and cases where the purchaser of the equity of redemption afterwards pays off the mortgage and gets in the legal estate. The only effect of such a distinction would be that the purchaser must get the legal estate conveyed to

(1) 17 Q. B. 366. (2) 17 Q. B. 373.
(3) 10 Ir. C. L. Rep. 346.

somebody else on trust for him, and then he would be safe. The plaintiff is in the same position substantially as if Robinson had joined in the conveyance to him in 1890.

It is submitted that the Court cannot draw the inference that there had been an agreement for partition and surrender of the mother's life estate in 1836 as suggested. No such point was raised by the pleadings or at the trial.

Cur. adv. vult.

June 3. The judgment of the Court (Lord Esher M.R., A. L. Smith L.J., and Chitty L.J.) was read by

CHITTY L.J. This is an appeal by the plaintiff, Thomas Thornton, against the judgment of Grantham J., before whom the action was tried without a jury. He found the facts in favour of the defendants and gave judgment for them accordingly.

The writ was issued on July 25, 1896. By his statement of claim the plaintiff claimed a declaration that he is entitled as tenant in common in fee to an equal undivided moiety of the Foresters' Arms with the gardens and outbuildings thereto belonging, and the rights of way and other privileges enjoyed therewith; and he asked for a partition on the footing of this declaration.

On the plan produced at the trial, and admitted to be substantially accurate, the property claimed is coloured green; it includes the Foresters' Arms, which is a beerhouse, the garden, and also a field. The other property shewn on the plan is coloured as to the greater part yellow; the remainder is coloured pink. The property coloured yellow consists of a cottage (which appears to be known as Hallas' Cottage) adjoining the Foresters' Arms, of a garden at the back of the cottage divided by a hedge from the garden of the Foresters' Arms, and of garden-ground adjacent to the field coloured green. The Foresters' Arms and Hallas' Cottage are about the same size, and the green garden and field are approximately of the same area as the gardens coloured yellow. The Foresters' Arms by reason of its licence is now of greater value than

C. A. 1897

THORNTON v. FRANCE.

Chitty L.J.

Hallas' Cottage. The Foresters' Arms and the cottage both front towards the Bradshaw Road, the entrance to the former being from the front, and to the latter from the back by a way over part of the green. There is no contest in the action about this way to the cottage, nor about the well or the washhouse coloured pink on the plan. When the writ was issued, the plaintiff was in possession of the yellow, and the defendants were in possession of the green.

By their defence the defendants, who are the trustees of the will of Joel France, relied on possession of themselves and their predecessors in title and on the Statute of Limitations. They also set up a presumed agreement in 1856 to partition the property shewn on the plan, and an actual division of the property into the green and the yellow in that year, and the exclusive possession of the green since that year by themselves and their predecessors in title. These were the main grounds of their defence. But, if these grounds failed, they counter-claimed in the alternative for a partition of the yellow. By his reply the plaintiff did not admit that the defendants had any interest in the yellow, and submitted that the defendants had no right to maintain their counter-claim for a partition of the yellow. The result is that the plaintiff, in effect, claimed the entirety of the yellow, and an undivided moiety of the green, and that the defendants claimed no interest in the yellow except in the event of the plaintiff succeeding in his claim to the green. If the plaintiff fails to establish his claim to a partition of the green, the action wholly fails.

So far as concerns the documentary title, and apart from the Statute of Limitations, the plaintiff and the defendants derive title from Susannah Senior, who died in 1856. She bought the land in 1834, and by her direction it was conveyed to her for life with remainder as to one undivided moiety to the use of her son Thomas for life, and, after his death, of his heirs and assigns, and as to the other undivided moiety to the use of her daughter Harriet Hallas, her heirs and assigns. Subject, therefore, to the life estate of Susannah Senior, the son and daughter each took under this settlement an undivided moiety in fee. Susannah Senior never in fact occupied any part of the property

herself, at all events after the two cottages were built. She built them in 1835 or 1836. Thereupon she put her son Thomas into possession of the cottage for which he afterwards obtained a licence, and now called the Foresters' Arms, and of the garden and field coloured green; and put her daughter Harriet into possession of the cottage known as Hallas' Cottage and the gardens coloured yellow. On the documentary title the plaintiff claims under Harriet and the defendants under Thomas.

Following out the title, apart from the Statute of Limitations, it stands thus. Thomas died in 1853, during his mother's life-time, intestate, leaving three daughters his co-heiresses and a widow. The defendants' case is that the three co-heiresses and the widow continued after the death of Thomas Senior in exclusive possession of the Foresters' Arms and ground until the conveyance of February 14, 1893. By deed of that date the co-heiresses conveyed all their estate and interest in the Foresters' Arms and grounds to Joel France. The defendants are his devisees. The plaintiff, as I have said, claims under Harriet Hallas. On April 8, 1865, she conveyed, or purported to convey, her undivided moiety in the entirety of the property to Hathorn and Owen by way of mortgage, and in 1866 they transferred the mortgage to Owen and Stocks. In February, 1875, the heir of the mortgagor, Harriet Hallas, conveyed the Hallas moiety to William Henry Thornton, and the surviving transferee of the mortgage joined in the conveyance for the purpose of receiving the mortgage-money and passing the legal estate. On June 11, 1886, William H. Thornton mortgaged this undivided moiety to Joe Robinson. In June, 1890, William H. Thornton sold his equity of redemption to the plaintiff; and by deed dated June 24, 1890, he conveyed to the plaintiff in fee his undivided moiety in the entirety, subject to the mortgage of 1886 then subsisting and outstanding in Joe Robinson. It was alleged on the part of the plaintiff that, some time before the issue of the writ, and, as we understand, in 1892, the plaintiff had paid off this mortgage; and, as we gather, this allegation was not contested at the trial. The plaintiff however had not obtained a reconveyance before the trial. It is said on behalf

C. A. 1897

THORNTON v. FRANCE.

Chitty L.J.

of the plaintiff on the appeal that he has since obtained it. Joe Robinson is not a party to the suit. At the trial the plaintiff asked for leave to add him as a co-plaintiff, but the judge refused to allow the amendment.

The judgment appealed from proceeds on the footing that the claim of the plaintiff is barred by the Statutes of Limitation, 3 & 4 Will. 4, c. 27, and the Real Property Limitation Act, 1874, which came into operation on January 1, 1879. A strong body of evidence was produced at the trial to shew that the two properties had been separately possessed and enjoyed as separate properties by Thomas and his successors in title as to the green, and by Mrs. Hallas and her successors as to the yellow. The evidence carried back the separate possession to the date of the cottages being built. On this issue of fact the learned judge held in favour of the defendants, and he carried back the separate possession for fifty or sixty years. We see no reason for differing from him on his general finding. The points raised on the facts against this finding are in our opinion wholly insufficient to justify us in disturbing it. It was urged that in 1876 William H. Thornton did some repairs on the Foresters' Arms; but, whatever he may have done, it was of the most trifling description: he was repairing the Hallas' Cottage, and may have done some slight work on the front windows of the Foresters' Arms. With this exception, which we consider of no importance, the evidence was clear that the repairs to the separate properties were done by the separate possessors for the time being.

The main question on the appeal turns on the statutes above referred to, and the statute 7 Will. 4 and 1 Vict. c. 28. The learned judge appears to have held that what may be termed the Hallas title was barred in 1865. This opinion would be founded on the 12th section of the Act of William IV., which abolished the old doctrine that the possession of one tenant in common was the possession of all except where ouster was proved; and on the 34th section, which transfers the estate which is barred. But in 1865 twenty years had not run since the death of Susannah Senior, who died in 1856. On her death the right of entry of Mrs. Hallas arose under the settle-

ment. On this point we were asked by the defendants' counsel to draw an inference of fact that the partition was agreed to and acted upon in the lifetime of Susannah Senior, and that, as part of this transaction, she surrendered to her son and daughter her life estate. As authorities for such an inference we were referred to *Tidbald* v. *James* (1) as explained by Monaghan C.J. in *Murphy* v. *Murphy* (2) on the authority of Martin B. We think, however, that this case can be decided without entering upon the consideration of drawing the inference suggested, and in the rest of our judgment we shall assume that the statute had not run against the plaintiff's title on April 8, 1865, when Harriet Hallas made the mortgage to Hathorn and Owen.

Now the argument for the plaintiff is this. Although the statute had been running against Mrs. Hallas for some nine years or so, when the mortgage of 1865 was executed, the statute ceased to run as against the mortgagees; and that, inasmuch as William H. Thornton took his conveyance in 1875 from the mortgagor and the transferee of the mortgage, he was a "person claiming under a mortgage of land" within the meaning of the statute 7 Will. 4 and 1 Vict. c. 28, notwithstanding that the mortgage was then paid off and had ceased to exist. A similar argument was presented in reference to the plaintiff's later title. It was contended that, although the statute may have begun again to run against William H. Thornton in 1875, and, although it had been running for some eleven years in 1886 (the twelve years' limitation was then in operation), it ceased to run or was stopped by his mortgage to Joe Robinson; and that, inasmuch as the plaintiff has paid off Joe Robinson, he also is a "person claiming under a mortgage of land" within the statute 7 Will. 4 and 1 Vict. c. 28. In support of these propositions *Doe* v. *Eyre* (3) and *Doe* v. *Massey* (4) were cited.

To succeed the plaintiff must make out these contentions. The argument when pushed to its extreme, but legitimate, length comes to this: that, where a man's title to land is on the point of being barred, all he has to do is to execute a mortgage

(1) 29 L. J. (Ex.) 91.
(2) 15 Ir. C. L. Rep. 205, 214.
(3) 17 Q. B. 366.
(4) 17 Q. B. 373.

C. A. 1897

THORNTON v. FRANCE.

Chitty L.J.

of the land, say, just before the statute has run, and then subsequently at his own time to pay off the mortgage; and thereby he would prevent the statute from running in favour of the person in possession until the expiration of the further statutory period after the mortgage has been paid off. In other words, the contention is that by execution of the mortgage a new right of entry is conferred, which passes to the mortgagor himself when he pays off the mortgage. For the purpose of the statutes under consideration we are unable to see any distinction between the case of a man taking a conveyance from a mortgagor alone, and afterwards paying off the mortgage, and the case of a man taking a conveyance of the land and then mortgaging and afterwards paying off the mortgage.

The reason for the passing of the statute 7 Will. 4 and 1 Vict. c. 28, and the effect and construction of the Act have frequently been considered by the Courts, notably in *Eyre* v. *Walsh* (1) and *Heath* v. *Pugh*. (2) The reason, stated broadly, was that it was doubted whether the statute 3 & 4 Will. 4, regard being had to the 2nd section, had not put the mortgagee as between himself and the mortgagor in a worse position than he was prior to the passing of that statute. The language of the statute 7 Will. 4 and 1 Vict. c. 28, is as follows. [The Lord Justice here read the statute.]

The question in *Heath* v. *Pugh* (2) related to the effect of a foreclosure decree. The judgment of the Court of Appeal, consisting of Lord Selborne and Baggallay L.J. and the present Master of the Rolls, was delivered by Lord Selborne, and was affirmed by the House of Lords in *Pugh* v. *Heath*. (3) After referring to the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 and 1 Vict. c. 28, Lord Selborne examined the nature of the mortgagor's possession before those statutes. He said: "The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be at the will or by the sufferance or permission of the mortgagee under a tacit agreement which the mortgagee might determine at his pleasure. It was of the nature of the transaction that

(1) 10 Ir. C. L. Rep. 346. (2) 6 Q. B. D. 345.
(3) (1882) 7 App. Cas. 235.

the mortgagor should continue in possession." He proceeded to point out that the former Statute of Limitations (21 Jac. 1, s. 16) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee. Then, coming to the statute 7 Will. 4 and 1 Vict. c. 28, he said that it did not itself create a bar in any case in which it had not been already created by the Act which it explains: "it only declares (in conformity, and with manifest reference to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal or interest from the person entitled to the equity of redemption within twenty years before the commencement of any action or suit." According to this judgment, which is of the highest authority, to bring the case within the statute 7 Will. 4 and 1 Vict. c. 28, the mortgage must be a continuing or subsisting mortgage. In *Doe* v. *Eyre* (1) the action was by the mortgagee. The mortgage was executed before the passing of the Act 3 & 4 Will. 4, c. 27, and there was no adverse possession by the defendant at the time when the mortgage was executed, or when the Act was passed. The defendant had been permitted by her brother, the mortgagor, to reside on the property without payment of rent. In *Doe* v. *Massey* (2) again there was no adverse possession at the time when the mortgage was executed. The mortgage had been paid off. Child, through whom the plaintiff claimed, bought the property from the mortgagor, and the mortgagee joined in the conveyance for the purpose of receiving the money due on the mortgage and conveying the legal estate to the purchaser. This is plain from the statement of the conveyance at p. 375 of the report shewing that Wilson, the mortgagor, was the directing party. It was held that the plaintiff "claimed under a mortgage" within the statute. If this decision is right, it would, apart from the point of adverse possession at the date of the mortgage, apply to the purchase deed of William H. Thornton in February, 1875, so that the statute would not have run against him till February, 1887; but it would not apply to the later title of the plaintiff, who, in no possible sense of the term as used in the statute, could be

(1) 17 Q. B. 366. (2) 17 Q. B. 373.

C. A. 1897

THORNTON v. FRANCE.

Chitty L.J.

said to claim under a mortgage until he paid off Robinson's mortgage in 1892, when the statute had already run against the plaintiff. The decision in *Doe* v. *Massey* (1) may be open to some question as being inconsistent with the judgment of the Court of Appeal in *Heath* v. *Pugh* (2), that to be within the Act the mortgage must be a subsisting mortgage. But, whether questionable or not, the decision does not govern the present case. In our opinion the plaintiff does not claim under a mortgage within the meaning of the Act 7 Will. 4 and 1 Vict. c. 28. Further we think that that Act does not confer a new right of entry on the mortgagee where, at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute 3 & 4 Will. 4 has already begun to run in his favour against the mortgagor. We can see no reason for giving so extensive a construction to an Act which was passed to remove a doubt—a construction which would tend in a large measure to undo the principal Act. The decision in this case will not in any degree imperil the rights of mortgagees. No person of ordinary prudence would advance his money on mortgage of land where the mortgagor claims an estate in possession without first ascertaining that the mortgagor is in possession or in receipt of the rents.

To avoid misapprehension we add that the plaintiff is in no worse position because Robinson was not added as a plaintiff. As the plaintiff was suing for a partition, he was entitled to maintain the action on his equitable title (unless barred); the objection that Robinson was not a party was at the utmost merely an objection for want of parties. The plaintiff's equitable title fell within the bar of the 24th section of 3 & 4 Will. 4, c. 27.

For these reasons we think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Van Sandau & Co., for C. H. Marshall, Huddersfield.*

Solicitors for defendants: *Jaques & Co., for Armitage, Sykes & Hinchcliffe, Huddersfield.*

(1) 17 Q. B. 373. (2) 6 Q. B. D. 345.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1897
June 15.

STONE *v.* PRESS ASSOCIATION, LIMITED.

Practice—Libel—Consolidation of Actions—Law of Libel Amendment Act, 1888 (51 & 52 *Vict.* c. 64), s. 5.

There is jurisdiction under the Law of Libel Amendment Act, 1888, s. 5, to make an order consolidating actions of libel brought by the same person against several defendants in respect of the same or substantially the same libel before the delivery of defences in the actions.

APPEAL from the order of a judge at chambers directing that the above-mentioned action and sixteen others should be consolidated.

The actions, which were for libel, were respectively brought by the plaintiff against the Press Association, Limited, and the owners of various newspapers in respect of a paragraph of a libellous nature concerning the plaintiff, which had been supplied by the Press Association to and published by the newspapers respectively. The defendants, before the defences were delivered in the several actions, applied at chambers for an order to consolidate the actions under s. 5 of the Law of Libel Amendment Act, 1888. It was stated on behalf of the defendants that in each action the only defence would be payment into court. The master made an order that the actions should be consolidated directly the defences were delivered. The judge, on appeal, made an order that the actions should be consolidated at once. (1)

(1) The Law of Libel Amendment Act, 1888, s. 5, provides that: "It shall be competent for a judge or the Court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and, after such order has been made, and before the trial of the said actions, the defendants in any new actions instituted in respect to the same, or substantially the same, libel shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated. In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or

C. A. 1897

STONE v. PRESS ASSOCIATION.

R. D. Isaacs, for the plaintiff. The judge had no jurisdiction under s. 5 of the Law of Libel Amendment Act, 1888, to make an order consolidating the actions before the pleadings were closed, or, at any rate, in the exercise of his discretion he should not have made such an order. The consolidation provided for in the section is not like the ordinary consolidation of actions at common law, but is only a consolidation for the purposes of trial. It is submitted that the effect of the judge's order is that there will be only one defence delivered—namely, one of payment into court of a lump sum to cover the whole of the plaintiff's damages. The effect will be to embarrass and prejudice the position of the plaintiff in an unfair manner. The section provides that there shall be a separate verdict in each action, and that the verdict may be against the defendants in some of the actions, and for the defendants in others. It must therefore contemplate that the defendants in each action shall plead separately. It is impossible to work the machinery given by the section unless they do so. If the defendants pay in a lump sum, the sole issue will be whether that sum is sufficient to cover the total amount of the plaintiff's damages. But there are distinctions between the various cases, the libellous paragraph being published in some of the newspapers with stronger headings. If the defendants in each action delivered separate defences, as it is contended they ought to do, severally paying money into court, it might be that the plaintiff would be entitled at the trial to a verdict against some of them, though not others. He might also think the sums paid in by some of the defendants sufficient, having regard to the circumstances of the publication in their cases, and then he could take the money out and would be entitled to tax his costs in those cases.

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against each defendant in the same way as if the actions consolidated had been tried separately; and, if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants."

In order to save costs, the plaintiff is quite willing that one defence only should be delivered, provided that it specifies how much the defendants in each action bring into court.

Temple Franks, for the defendants, was not called upon.

LORD ESHER M.R. In this case, a libel having been published with regard to the plaintiff, several newspapers have copied it, and the plaintiff, being desirous of vindicating his character, has commenced seventeen actions for libel. Sect. 5 of the Law of Libel Amendment Act, 1888, provides for such a case. It gives a discretionary power to a judge or the Court, "upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together." That is the whole of that portion of the section which confers the authority to order a consolidation of the actions, and there is nothing in it with regard to the time at which such an order is to be made. If it had been meant that an order should only be made for consolidation of the actions after defences delivered, the Legislature would have said so; but they have not. The master made an order for consolidation, but he postponed the application of it until after the defences had been delivered. When the case came before the judge, he struck out that part of the master's order which postponed the consolidation of the actions until after defences delivered, and made an order simply for the consolidation of the actions. It is contended for the plaintiff that a separate defence ought always to be delivered in each of the actions, and, if that is not done, difficulties will arise, and it will be impossible to carry out the rest of the section. I do not see any such difficulties in this case. The subsequent part of the section provides that, in a consolidated action under the section, the jury shall assess the whole amount of the damages (if any) in one sum. That is the only sum with which the plaintiff has anything to do. The section then proceeds to provide that a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately, and, if the jury find a

C. A. 1897

STONE v. PRESS ASSOCIATION.

Lord Esher M.R.

verdict against the defendant or defendants in more than one of the actions consolidated, they shall proceed to apportion the amount of damages which they have found between and against the last-mentioned defendants. The meaning seems to be that, if there are several actions consolidated, the jury need not necessarily find against the defendants in all the actions. They may find verdicts against the defendants in some of them; and they must find against those defendants in one sum, and must then apportion the one sum which they have found among them. If they think that the defendants in one of the actions are the principal libellers, or that there are headings or expressions used by some of the defendants in their newspaper that make the libel stronger in their case, they may apportion the sum so that such defendants may have to bear a larger proportion than the others. But it seems to me that the apportionment among the defendants has no effect as regards the plaintiff. The whole object of the section appears to me to be the prevention of what the plaintiff's counsel contended for, namely, the multiplication of pleadings, and the consequent multiplication of costs, and the burthen thereby thrown upon defendants who may have inadvertently copied a libel, the real libellers being those who first published it. If the contention for the plaintiff were correct, I think the provisions of s. 5 would be of very little use. No difficulty can arise in such cases as to the costs, because by the section the judge at the trial has an absolute discretion with regard to the apportionment of the costs between the defendants. I think the order of the learned judge was right and that this appeal must be dismissed.

A. L. SMITH L.J. One of the objects of the Law of Libel Amendment Act, 1888, was to afford relief to the proprietors of newspapers against the multiplication of actions for libel. In this case the plaintiff, not content with suing the originators of the libel, has also brought actions against the proprietors of sixteen newspapers who have copied the libellous paragraph into their papers. It was precisely for the purpose of meeting such a state of things and relieving newspaper proprietors from oppressive litigation of this kind that s. 5 of the Act

was passed. An application is made by the defendants for the consolidation of the actions brought by the plaintiffs, and I can see no reason in this case why they should not be consolidated as ordered by the judge. It seems to me to be exactly what was intended by the Act. It was admitted that all the defendants were going to pay money into court by way of defence. The master made an order that the actions should be consolidated, but not until after the defences had been delivered. The result of that would be that seventeen defences would have to be delivered, and the necessary costs of delivering each defence incurred. When the case came before the judge, he ordered that, inasmuch as all the defendants were going to rely on payment into court, the actions should be consolidated forthwith. The plaintiff's counsel argues that the judge had no power under the section to make that order. He could not point to any words in the section expressly imposing any limit of time with regard to the making of the order for consolidation, but he suggested that the words "so that they shall be tried together" imported that the consolidation cannot be made until after the defences have been delivered. I cannot find any such limitation in the section, and in my opinion it is competent to the judge at any time to consolidate the actions under its provisions. It was urged that the effect of making an order for consolidation before delivery of defences would be embarrassing to the plaintiff. But in what way? The plaintiff wishes to force the defendants in each action to pay a sum of money into court; and it may well be that, if he could do that, he would take the money out of court and tax his costs in a number of the actions, and not proceed any further with these actions. He may be embarrassed as to this, and, if so, so much the better. The object of the enactment was to prevent a number of actions being brought when they are not necessary for the vindication of character. I agree that the appeal should be dismissed.

RIGBY L.J. Sect. 5 of the Law of Libel Amendment Act, 1888, was manifestly passed with the object of diminishing costs in cases where several actions of libel are brought in

C. A. 1897

STONE v. PRESS ASSOCIATION.

Rigby L.J.

respect of what is substantially the same libel. It gives in such cases a discretionary power to the judge to consolidate the actions so that they may be tried together. It appears from the latter portion of the section that, where there is a consolidation of actions, there may nevertheless be verdicts for some of the defendants and against others. It seems to follow from that that the defendants in the several actions may put in different defences, and that it was not contemplated that their power of doing so should be interfered with by the consolidation. What then is the judge to do when application is made for a consolidation? I suppose he must do what the judge in the present case seems to have done, namely, inquire what defences are to be set up. If, as in the present case, all the defendants say that they are going to pay money into court, he will see that separate defences are not needed and, that being so, will make the order for consolidation of the actions at once. A sum of money being paid into court, the total amount of the damages in the consolidated action will under the section be assessed by the jury, and the issue whether the amount paid into court is sufficient will be determined by the amount of the total sum so assessed. Under the circumstances I think that the order made by the learned judge was right. I am far, however, from saying that a judge ought to make an order under this section which would have the effect of excluding separate defences. His jurisdiction under the section is discretionary, and, when he finds that the defendants desire to set up different defences, his order should be framed so as to admit of their being set up.

Appeal dismissed.

Solicitors for plaintiff: *Smith & Hudson.*
Solicitors for defendants: *Lewis & Lewis.*

E. L.

GREENWELL AND OTHERS *v.* THE LOW BEECHBURN COAL COMPANY.

1897
June 15, 16, 24.

Mine—Lease—Compensation Clause—Subsidence—Injury to Land and Buildings—Liability of Lessee—Damage caused by act of Lessee's Predecessor in Title.

Mines were granted by deed, with power to the grantee and his assigns to work, making reasonable compensation for all damage occasioned to the surface of the lands, or to buildings thereon, by the exercise of the powers by the indenture granted:—

Held, following *Davis* v. *Treharne*, (1881) 6 App. Cas. 460, that damage by subsidence was not covered by the compensation clause, and therefore the assigns of the grantee were liable to an action to recover damages for injury done to the surface of the land by subsidence caused by working the mines.

A lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease.

Therefore, where the plaintiffs' buildings, erected more than twenty years before action, on land, the mines under which were worked by the defendants under a lease, were injured, during the currency of the lease, and within six years before action, by subsidence caused, not by the acts of the defendants, but by the acts of their predecessor in title, done prior to the date of the lease:

Held, that the defendants were not liable.

FURTHER CONSIDERATION before Bruce J.

The action was brought by Thomas Greenwell, and two others, who were owners, as tenants in common, of certain undivided shares of a dwelling-house, and other buildings, land, and premises called Job's Hill Farm, near Crook in the county of Durham, to recover damages for alleged wrongful withdrawal of support from the plaintiffs' land and buildings. The buildings in question had been erected on the land more than twenty years before the commencement of the action. By a deed dated January 24, 1856, certain coal mines under the land were granted to a person named Sharp, with liberty to work, subject to a proviso that Sharp or his assigns should

1897

GREENWELL v. LOW BEECHBURN COAL CO.

make reasonable compensation for all damage or spoil occasioned to the surface of the lands or grounds, or to any crops, houses, buildings, or erections thereon, by the exercise or enjoyment of all or any of the powers granted by the deed. From 1856 to 1889 Sharp or his mortgagees continued to work the mines. On September 17, 1889, the mines and minerals comprised in the deed of January 24, 1856, were leased to the defendants, who worked the coal. Subsidences afterwards took place, which injured the land and buildings of the plaintiffs.

At the trial before Bruce J. at the Durham Assizes the jury (among other findings referred to in the judgment) found that there had been subsidence during the period of six years before the commencement of the action, causing damage to the plaintiffs' buildings; but they also found that such damage to the buildings had not been caused by workings carried on by the defendants, but had been caused wholly by workings carried on by Sharp. Nothing had been done by the defendants to afford support to the excavations which had been made by Sharp.

The case was reserved for further consideration.

June 15, 16. *Boyd, Q.C.*, and *W. A. Meek*, for the plaintiffs. *Strachan, Q.C.*, and *H. F. Manisty*, for the defendants.

Cur. adv. vult.

June 24. BRUCE J. delivered the following written judgment:—This is an action by the plaintiffs, who are the owners as tenants in common of certain undivided shares in buildings, lands, and premises called Job's Hill Farm, to recover damages from the defendants for injury done to the buildings and lands of the plaintiffs by reason of subsidences alleged to have been occasioned by the acts or defaults of the defendants.

In 1837 one J. H. Greenwell was the owner of the surface of the lands in question and of the minerals. He died, having by his will devised the property in fourteen parts. On the death of J. H. Greenwell, Thomas Greenwell became entitled to certain shares in the property, and by an indenture bearing date January 24, 1856, he granted his interest in the minerals

to one John Sharp. The plaintiffs represent the interest of Thomas Greenwell, and the defendants are lessees of the minerals under Sharp.

The first question raised was whether the plaintiffs were entitled to have their lands and buildings supported by the subjacent and adjacent soil. It was not in dispute that the buildings in question had at all material times been in existence on the land for more than twenty years, but it was contended on the part of the defendants that Thomas Greenwell had by the indenture of January 24, 1856, granted to Sharp the right of mining so as to let down the surface, subject only to the proviso that Sharp or his assigns should make reasonable compensation.

This question turns upon the construction of the deed in question. I do not think it is necessary that I should read the material passages in the deed. They are long, and they have been fully discussed in argument. It is enough for me to say that the provisions of the indenture do not seem to me to differ in substance from the provisions of the lease in *Davis* v. *Treharne*. (1) The deed grants to Sharp certain shares in the coal mines, collieries, seam, and seams of coal, lying under Job's Hill Farm, with liberty, power, and authority to Sharp and his assigns to do certain things underground, and other things upon the surface, making reasonable compensation for all damage or spoil occasioned to the surface of the lands or grounds, or to any crops, houses, buildings, or erections thereon, by the exercise or enjoyment of all or any of the powers by the indenture granted. When I find that the powers granted do include a great many things which, apart from subsidence, will necessarily damage the surface, I think I may adopt the language of Lord Blackburn in *Davis* v. *Treharne* (1), and say that the reasonable conclusion is that the compensation is intended to apply to damage caused by things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that Greenwell intended that the defendants should be able to do something more and let down the surface. At all events, it seems to me there are no

(1) 6 App. Cas. 460.

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

words sufficiently express to justify the conclusion that damage by subsidence was intended to be covered by the compensation clause. I am therefore of opinion that Sharp had no right to mine so as to let down the plaintiffs' land or the buildings which had been on the land for more than twenty years, and that the defendants, who derived their title from Sharp, had no greater right than he had. In other words, there is nothing in the deed of January 24, 1856, to deprive the plaintiffs of their common law right to have their land, and the houses which had been on the land for more than twenty years, uninjured by subsidence occasioned by the mining operations of Sharp or the defendants. From 1856 to 1889 the mines under Job's Hill Farm were worked by Sharp or his mortgagees, and during that time Sharp made compensation to the tenant of the farm for damage occasioned by subsidence caused by his workings, and repaired certain of the farm buildings which had become damaged by reason of the subsidence. I may mention here that it was contended on behalf of the defendants that these facts shewed that Sharp himself considered that the compensation clause applied to damage by subsidence, and that therefore the words of the indenture ought to receive a wider construction than that I have given to them. But it seems to me that the words of the indenture must bear their natural construction, and that the acts of Sharp cannot operate to extend their meaning, so as to affect the liability of the defendants or to prejudice the rights of the plaintiffs. In 1889 Sharp ceased to work the mines. On September 17, 1889, Sharp, therein called the lessor, entered into an agreement with certain persons, called the lessees, representing the defendants, whereby Sharp agreed to grant to the lessees, and the lessees agreed to accept, a lease of all the coal mines and seams of coal, as well opened as not opened, lying and being within and under, or which could, should, or might be sought for, won, wrought, obtained, or gotten forth and out of (inter alia) all those closes situate at Job's Hill and comprised in the before-mentioned indenture of January 24, 1856. In exercise of the powers contained in the last-mentioned lease the defendants worked a portion of the coal under Job's Hill Farm, and it was alleged that by reason

of the working of the coal by the defendants damage had been occasioned since May 30, 1890 (that is, within a period of six years prior to the issue of the writ in the present action), to the lands and buildings of the plaintiffs.

At the trial it was admitted that damage had been caused by the working of coal by the defendants to two fields of the plaintiffs numbered on a plan used at the trial 197, 201. As to these fields, therefore, the only question for the jury was the quantum of damage. The defendants had paid into court the sum of 35*l.* by way of alternative defence; but as the jury assessed the damage to the two fields at 50*l.*, on this part of the case there was a verdict for the plaintiffs.

The substantial contest at the trial arose with respect to an allegation in the statement of claim that damage had been caused by subsidence to other lands on the farm and to the buildings. The jury found for the defendants as to these other lands—they found that there had not been subsidence causing damage to these lands within a period of six years before the issue of the writ. But they found that there had been subsidence during the period in question causing damage to the plaintiffs' buildings, and they assessed the damage thus caused to the buildings at 100*l.* They further found that the damage to the buildings had not been caused by workings carried on by the defendants, but had been caused wholly by workings carried on by Sharp.

The plaintiffs contended that on these findings they were entitled to have a verdict entered for them for 100*l.* in respect of damage to the buildings.

It was alleged on behalf of the plaintiffs that as the defendants were, during the period when the damage was done, in possession of the mines which had been worked by Sharp, they were liable for the consequences of the subsidence in question, because they had allowed the surface to remain, from the time when they entered into possession until the subsidence had taken place, without sufficient support, and they had neglected to counteract or prevent the consequences of Sharp's workings by providing proper artificial support.

This raises the question whether a defendant, who is possessed

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

of, or at least is lessee of, underground strata, becomes liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the defendant's lease, caused not by any act of commission on the part of the defendant, but resulting from an excavation made in the underground strata by the defendant's predecessor in title prior to the date of the lease.

So far as I can ascertain there is no reported case bearing upon the point, and, with the exception of a decision of Collins J. in the case of *Alderson* v. *Bolckow, Vaughan & Co.* (1), tried at York on March 6, 1896, there has been no judicial decision upon the point. I need not say that I attach the very highest value to the decisions of the learned Judge, but I cannot find any satisfactory report of the exact facts which were proved before him, and I am by no means sure that the contention which has been set up in the present case was pressed upon his attention, or even seriously argued before him. I do not, therefore, feel able to rest upon the authority of his decision.

It becomes necessary, then, that I should examine the grounds upon which it is suggested the liability of the defendants rests in the present case.

The general question of the liability of the owner of mines for injury caused by reason of his underground workings to the surface and to buildings upon it has been much discussed in recent years. In *Bonomi* v. *Backhouse* (2) the question raised was whether the Statute of Limitations ran from the time of the accruing of the damage, or from the time of the taking away of the support which caused the damage. It was finally decided by the House of Lords that the statute did not begin to run until the time of the actual happening of the damage. In order to determine the question when the statute began to run it became necessary for the judges to consider the nature of the right which gave rise to the cause of action. Here it is necessary to observe that although the right of the owner of the surface, and the right of the owner of the buildings on the

(1) Not reported. (2) (1858-59) E. B. & E. 622; (1861) 9 H. L. C. 503.

surface, not to have the land or buildings interfered with by underground working on the part of the owner of the minerals, stand upon different footings as to the mode of acquiring them, yet the right as regards buildings when once acquired is in character the same as the right of the owner of the surface. (See per Willes J. (1) and per Lord Blackburn. (2)) As I have already observed, the buildings in question in the present case at all material times were more than twenty years old, and were in the nature of ancient buildings, and it will be unnecessary, in discussing the character of the right, to distinguish between land and buildings. For practical purposes in this case the character of the right in each case is the same. Wightman J., in giving his judgment in *Bonomi* v. *Backhouse* (3), expresses the opinion that the cause of action was founded upon a breach of duty on the part of the defendant by so using his property as to injure that of his neighbour, and not upon any right of the plaintiffs to an easement in, upon, or over, the land of their neighbours. In the Exchequer Chamber Willes J., in delivering the judgment of the Court, affirming the view expressed by Wightman J., says: "We think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred." (4) In the same case, in the House of Lords, Lord Cranworth says: "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with he has nothing of which to complain." (5)

In *Lamb* v. *Walker* (6) Cockburn C.J., referring to the decisions of the Exchequer Chamber and the House of Lords in *Backhouse* v. *Bonomi* (7), says: "The decisions . . . . establish conclusively and incontrovertibly that it is not the

(1) E. B. & E. at p. 654.
(2) In *Dalton* v. *Angus*, (1881) 6 App. Cas. 740, at p. 809.
(3) E. B. & E. at p. 636.
(4) E. B. & E. at p. 659.
(5) 9 H. L. C. at p. 512.
(6) (1878) 3 Q. B. D. 389, at p. 402.
(7) E. B. & E. 622; 9 H. L. C. 503.

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

withdrawal of the support previously afforded by the adjacent strata—a support to which, according to the view there taken, the adjoining owner had abstractedly no right—but the actual disturbance of his enjoyment of his property which constitutes a wrong and gives a legal ground of complaint. . . . . The act of the excavating owner is not tortious in se; it is tortious only when it produces, and, as it seems to me to follow logically, to the extent to which it produces, actual damage." The same view of the nature of the right of action in cases of this character is expressed by the judges in the Court of Appeal in *Mitchell* v. *Darley Main Colliery Co.* (1), and in the same case by the majority of the judges in the House of Lords. (2) In the last-mentioned case the defendants in 1867 and 1868 worked a seam of coal lying under and near to the plaintiff's land. A subsidence took place in 1868 and continued until 1871, and cottages of the plaintiff's were damaged by the subsidence. The plaintiff made a claim upon the defendants in respect of that damage, and the defendants repaired the damage, and so satisfied and discharged the cause of action in respect of that damage. Afterwards, without any further working on the part of the defendants, a further subsidence took place in 1882, caused wholly or in part by the defendants' workings in 1867 and 1868, and did further damage to cottages of the plaintiff's. On September 27, 1882, the plaintiff brought an action for this further damage. The defendants pleaded the Statute of Limitations; but it was held in the Court of Appeal and in the House of Lords that the plaintiff was entitled to recover. The judgments of the Master of the Rolls and the other judges of the Court of Appeal in *Mitchell* v. *Darley Main Colliery Co.* (1) affirm the principles laid down in the earlier cases to which I have referred. But there are some expressions in the judgment of the Master of the Rolls which the plaintiffs in the present case have relied upon as supporting their contention. The Master of the Rolls says: "What they" (the defendants) "did in excavating was perfectly lawful, if they had taken care that in so using their property they did not hurt him" (the plaintiff); "but in 1868, or immediately afterwards, they

(1) (1884) 14 Q. B. D. 125. (2) (1886) 11 App. Cas. 127.

did something which did give him a cause of action—that is, they caused his land to subside. . . . . That cause of action was settled between them when they repaired his houses; but now they have done him a new and wholly independent injury: they have caused his land to subside again. . . . . They have caused that subsidence by the excavation of the minerals in 1868, and by not having filled up that excavation before 1882. . . . . I cannot help thinking that the judgment of the Lord Chief Justice (1) . . . . examines the whole subject afresh, and gives the most weighty reasons to shew that in such a case as this the only cause of action is the subsidence of the plaintiff's land, and if that subsidence has been brought about by the defendants, whether or not by the omission of something after commission—that is, without taking precautions against the consequences of an act of commission by them—each subsidence is a new cause of action. . . . . I agree with the Lord Chief Justice's view that each subsidence is a new cause of action, although the causa causans of each subsidence may be the same. It may be argued that the causa causans is not the same. The causa causans of the first is the excavation; the causa causans of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of its remaining unremedied." (2) It is contended that some of the phrases in the judgment I have quoted support the view that the causa causans of the second subsidence in *Mitchell* v. *Darley Main Colliery Co.* (3) was the neglect to fill up the excavation. But I think that the judgment must be read in connection with the facts of the case, and the Master of the Rolls nowhere speaks of the simple neglect to fill up the excavation, or to provide artificial support, as an act of omission of such a character as to give a cause of action. In each case he speaks of the taking away of the support, and the neglect to provide artificial support, as acts which, taken together, operated to cause the subsidence so as to give a right of action. But even if the words can be so construed as

(1) In *Lamb* v. *Walker*, 3 Q. B. D. 389.

(2) 14 Q. B. D. at pp. 129, 133, 134.

(3) 14 Q. B. D. 125; 11 App. Cas. 127.

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

to lead to the conclusion that the neglect to provide artificial support of such a character as to prevent the second subsidence was to be regarded as the cause of action, it does not follow that, because there is an obligation upon a person who has made an excavation of such a character as will, if left without being artificially filled up, cause successive subsidences in his neighbour's land, to prevent the subsidence by providing artificial support, therefore a similar obligation attaches to a person who is merely in possession of the minerals, and has done no act calculated to cause damage to his neighbour. I do not think any of the expressions in the judgment I have referred to support the contention that where a subsidence causing damage to the surface arises from excavations in mines, a person who has not been concerned in making the excavation, and who happens to be in the possession of the mines before and at the time of the subsidence, is liable for the damage caused by the subsidence simply because he did not take measures to arrest the subsidence.

It remains to consider the judgment of Lord Blackburn in the same case delivered in the House of Lords. Lord Blackburn dissented from the judgment of the other Judges in the House of Lords, and it is contended that the reasons he gives for his dissent strongly support the contention of the plaintiffs in the present case. The passage relied upon commences near the top of page 144 in the report as printed in 11 Appeal Cases. He refers to an expression used by Bowen L.J. in his judgment in the same case in the Court of Appeal. The Lord Justice had referred to *Whitehouse* v. *Fellowes*. (1) In that case the trustees of a turnpike road had constructed a covered drain with catch-pits to carry off the water from the surface of the road into the drain; but, in consequence, as the jury found, of the negligent way in which the catch-pits were constructed and kept, the drain was insufficient to carry off the water, and it was diverted to the plaintiff's land and drowned his colliery. A statute limited the period for bringing an action against the trustees to within three months after the fact committed. The action was brought within three months of the particular

(1) (1861) 10 C. B. (N.S.) 765.

damage complained of, but more than three months after the construction of the drain and catch-pits. It was held that, as an injury was done to the plaintiff by reason of the improper management of the catch-pits, he was not bound to rest his complaint upon the original construction of the works; but that the continuance by the defendants of that negligent and improper condition of the road under their charge, if accompanied by fresh damage to the plaintiff, constituted a fresh cause of action. Bowen L.J., in *Mitchell* v. *Darley Main Colliery Co.* (1), says: "Applying the reasoning of *Whitehouse* v. *Fellowes* (2), it seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support—that is to say, not merely an original act the results of which remain, but a state of things continued, and a state of things continued which has led to and caused the subsequent damage." Lord Blackburn, referring to that passage, says: "If I could take that view of the facts I should agree in the conclusion. But I cannot take that view of the facts." (3) It seems to be clear why he could not take that view of the facts. During the argument of the case in the House of Lords a statement was agreed to in writing between the appellants' and respondent's counsel, and part of that statement was as follows: "That after the partial subsidence in 1868 the strata remained practically quiescent until the working of the coal in the next adjoining land in 1881." (4) After that statement had been agreed upon, it was, I think, impossible to treat the case as if the facts proved had shewn that there had been a continual withdrawal of support. Then Lord Blackburn proceeds to point out what in his opinion would be the consequence of assuming that in all cases of successive subsidences there had been a continual withdrawal of support. He says: "One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked-out seam lay would be liable to an action for continuing a nuisance. Surely the facts cannot be such as would produce that effect.

(1) 14 Q. B. D. at p. 138.
(2) 10 C. B. (N.S.) 765.
(3) 11 App. Cas. at p. 144.
(4) 11 App. Cas. at p. 128.

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

And unless they are, I do not think that they can make the defendants responsible on this ground." (1) In that passage Lord Blackburn is not, I think, to be understood as saying that any such consequences follow from the judgment of the House. He did not agree with the law as laid down in that judgment. He did agree with the conclusion of law laid down by Bowen L.J. in the passage he referred to, but he could not agree in the view of the facts upon which that conclusion was founded. And he points out what would be, in his opinion, the consequence of holding the defendants liable upon the assumption of fact that there had been a continual withdrawal of support. When the passage of Lord Blackburn's judgment is carefully examined it seems to me that it does not afford support to the contention that such consequences as he mentions follow from holding the Darley Main Colliery Company liable upon the grounds upon which the House of Lords held them liable.

It remains to consider whether, on the general principles of law, the defendants can be rendered liable upon the ground that they have allowed a nuisance to continue on their land which has caused damage to the defendants. It is upon this principle that the learned writer of a valuable text-book on the Law of Support contends that the person in possession of the mines at the time when the subsidence took place may be rendered liable for the damage caused by the subsidence: Banks on Support, pp. 5–7.

There is a dictum of Littledale J. in the case of *Laugher* v. *Pointer* (2), which is frequently quoted. That very learned judge, in the course of his judgment, says: "And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises." The

(1) 11 App. Cas. at p. 144. (2) (1826) 5 B. & C. 547, at p. 560.

question before the Court in *Laugher* v. *Pointer* (1) was whether the defendant could be rendered liable for the negligent driving of a driver who had been provided by a livery stable-keeper. No question arose as to the character of the act; the only question was whether the defendant could be rendered liable for the acts of a man who was not his servant; and it was with respect to that question that Littledale J. was referring in the passage in question. He was explaining that in some cases, where acts in the nature of wrongful acts had been committed by persons not the servants of the occupier, the occupier had yet been held liable, on the ground that he is in law answerable for the acts of persons whom he brings upon the premises.

It seems to me that the true rule is laid down by Rolfe B. in *Reedie* v. *London and North Western Ry.* (2) He says: "It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that, in some cases, he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others."

This leads me to consider the question, What act has been done which it was the duty of the defendants to take due care to prevent? The answer must be that they have not taken due care to prevent the subsidence. But what duty was there on their part to prevent the subsidence? They had taken no part in the excavation. The excavation was not wrongful. Until the damage ensued there was no cause of action—no cause of complaint against any one. How, then, did the duty arise by which it became incumbent on the defendants, before the subsidence took place, to anticipate or prevent the subsidence? It is said that the defendants were bound so to use their land as not to injure their neighbours. So they were. But they have done nothing to cause injury to their neighbours; and, unless they are under an obligation to prevent the consequences of an

(1) 5 B. & C. 547. (2) (1849) 4 Ex. 244, at p. 256.

1897

GREENWELL v. LOW BEECHBURN COAL CO.

Bruce J.

act done by their predecessor in title, they have not been guilty of any omission of duty for which they can be rendered liable.

It is suggested that the excavated strata left without any artificial support amounted to a nuisance; but I do not think they did. Until the actual subsidence happened there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon any one to provide artificial support; and, therefore, it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things.

It was contended that the principle laid down in *Rylands* v. *Fletcher* (1) applies. The principle decided in that case is thus shortly stated by Blackburn J. in the Court of Exchequer Chamber, and the passage is cited with approval by the Lord Chancellor in his judgment in the House of Lords: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape." (2) The present case does not seem to me to fall within that rule. The defendants did not create a state of things likely to do mischief; they did nothing to continue or keep up the state of things likely to do mischief, and they did not invade the plaintiffs' right of property by suffering any mischievous thing to escape from their property on to the plaintiffs'. It seems to me that there is no analogy between the two cases.

In the judgment of Lord Halsbury in *Mitchell* v. *Darley Main Colliery Co.* (3) the case of *Rylands* v. *Fletcher* (1) is referred to, not as affording an illustration of the principle upon which the right of action in *Mitchell* v. *Darley Main Colliery Co.* (4) rested, but as affording an example of a state of facts in which successive causes of damage would give rise to successive actions.

(1) (1868) L. R. 3 H. L. 330.
(2) L. R. 3 H. L. at pp. 339, 340, per Lord Cairns C.
(3) 11 App. Cas. at p. 133.
(4) 11 App. Cas. 127.

It follows, from what I have said, that I cannot discover any grounds upon which the defendants can be held liable in law to take active steps to prevent the damage to the plaintiffs' land resulting from an excavation which they did nothing to make or to continue. But I may observe that if in any case any such obligation were imposed upon them, such obligation could only arise in cases where it is proved to be practicable for the defendants by artificial support to have prevented the subsidence. In the present case there is nothing to shew that that would have been possible. I was not asked to leave any question to the jury on that point, but I think there is little doubt that if the question had been asked they would have found that it was not possible for the subsidence to have been prevented by any act of the defendants, unless, indeed, they had taken such steps immediately upon their entering upon their lease. The workings which occasioned the mischief were carried on by Sharp not later than 1889; the subsidence complained of took place after May 30, 1890. Although it may be possible in some cases soon after minerals have been worked out to prevent subsidence by providing artificial support, yet, when a considerable period has been allowed to elapse after the workings have been carried on, the roof of the workings falls in, and it is generally exceedingly difficult, if not impossible, to arrest the subsidence, which commonly begins in the lower strata some time before it reaches the surface. But I do not think it is necessary to speculate concerning this matter, because there is certainly nothing to shew that the defendants could by any means have prevented the subsidence.

In the result I enter verdict and judgment for the plaintiffs for 50*l.* for the claim in respect of fields 197 and 201 and costs. On the other issues I find for the defendants.

Judgment accordingly.

Solicitors for plaintiffs: *Cunliffes & Davenport, for J. G. Wilson, Ornsby & Cadle, Durham.*

Solicitors for defendants: *King, Wigg & Co., for J. & R. D Proud, Bishop Auckland.*

P. B. H.

1897
May 6, 7;
July 3.

JAMES, Appellant *v.* EVANS & CO., Respondents.

Master and Servant—Remedies—Jurisdiction of Justices—Proceedings against Servant—Continuous Breach of Contract—Further Proceedings—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.

By the Employers and Workmen Act, 1875, s. 4, a dispute between an employer and a workman may be determined by a court of summary jurisdiction, provided that the Court shall not exercise jurisdiction where the amount claimed exceeds 10*l.*

On October 22 the respondents agreed to employ the appellant, and he agreed to serve them, for fifty-two weeks, at specified weekly wages. On November 16 the appellant left his work, and did not return.

On December 16 the respondents took proceedings, under the Act, in a court of summary jurisdiction, against the appellant, and recovered 10*l.* damages for his absence from November 16 to 28. Afterwards the respondents took further proceedings, in the same court, to recover another 10*l.* for the appellant's absence from November 30 to December 12.

On a case stated:—

Held, that the jurisdiction of the Court, being limited to 10*l.*, was exhausted by the judgment in the first case, and therefore the respondents were not entitled to recover in the second case.

Case stated by the stipendiary magistrate for the city of Birmingham.

On December 16, 1896, the respondents commenced an action in the City of Birmingham Police Court against the appellant to recover the sum of 10*l.* damages. The action was brought in this court under and by virtue of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) (1), and the rules made in pursuance thereof.

(1) Sect. 3 confers jurisdiction on the county court as to ordering of payment of money, set-off, and rescission of contract, and taking security.

Sect. 4: "A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court; provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—

"(1.) Shall not exercise any jurisdiction where the amount claimed exceeds 10*l.*; and

"(2.) Shall not make an order for

The particulars of claim in the action were as follows:—

"The claim is for damages for the defendant absenting himself from work from November 16, 1896, to November 28, 1896.

"Amount claimed 10*l*."

On December 23, 1896, the action came on for hearing before the magistrate. The respondents produced and proved the following agreement, dated October 22, 1896: "The company" (the respondents) "agree to engage, and the employee" (the appellant) "agrees to serve the company in the capacity of foreman (working) in the company's business of tube manufacturers for the term of fifty-two weeks from the date hereof.

"The employee shall diligently and faithfully serve the company, and shall conform to the requirements of the company. . . . .

"In consideration of such service the company agree to pay the employee the sum of 38*s*. per week, and 10 per cent. bonus on that amount, payable on the Saturday morning in each week."

It was proved that appellant had left work on November 16, 1896, and had not since returned.

After hearing the evidence and arguments adduced by both parties, the magistrate held that the appellant had wrongly absented himself from work, and decided the case in favour of the respondents, and ordered judgment to be entered for the amount claimed, namely, 10*l*., with costs.

On December 29, 1896, the respondents commenced a second action against the appellant in the police court. The particulars of claim were as follows:—

"The claim is for damages for the defendant absenting himself from work from November 30, 1896, to December 12, 1896.

"Amount claimed 10*l*."

On January 6, 1897, the second action came on for hearing

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the payment of any sum exceeding 10*l*., exclusive of the costs incurred in the case; and

"(3.) Shall not require security to an amount exceeding 10*l*. from any defendant or his surety or sureties."

1897

JAMES v. EVANS & Co.

before the magistrate. The respondents again produced and proved the before-mentioned agreement, and it was again proved that the appellant had left the respondents' service on November 16, 1896, and had not since returned.

After hearing the evidence and the arguments of counsel, and upon an admission by counsel for the respondents that the appellant, on leaving his work on November 16, 1896, intended to finally break and determine the contract, but that such intention was not assented to by the respondents, the magistrate was of opinion that the objection raised by the appellant was not in law well founded, and he directed judgment to be entered for the respondents for the amount claimed with costs.

The question for the opinion of the Court was, whether the magistrate was right in ordering judgment in the second action to be entered for the respondents, or whether judgment should have been entered for the appellant.

May 6, 7. *Asquith*, Q.C. (*McCardie* with him), for the appellant. In the first place, the jurisdiction of the magistrate, being limited by s. 4 of the Act to 10*l.*, was exhausted by the judgment for that amount, which he had given for the respondents in the first proceeding, and therefore he had no jurisdiction to entertain the second proceeding; and, secondly, the claims in both proceedings were for the same cause of action. The respondents might, and ought to have brought one action in the High Court, or the county court, to recover all damage arising from the appellant's breach of his agreement. They are not entitled to split up their claim, as they seek to do, and harass the appellant with a series of proceedings in the police court for absence from work during different periods of time, all of which are covered by the agreement of October 22. There is no precedent for any such proceeding as this. The policy of the law is that any damages which could be recovered in the first action must be so recovered, if at all. The claims in both proceedings arise out of the same contract, and are claims in respect of one continuing breach. The decisions relating to convictions do not bear on the present case.

Hugo Young (*Carson*, Q.C., and *H. J. Rowlands* with him),

for the respondents. Inasmuch as the damages recovered in the first proceeding were in respect of absence from work for a period ending on November 28, the claim for damages for the period ending December 12 was for a separate and distinct cause of action, in respect of which the respondents were entitled to recover notwithstanding the first judgment. There were two separate and distinct disputes, giving rise to two separate and distinct causes of action. There is a remedy which meets the case suggested of proceedings being vexatiously repeated, for by s. 3, sub-s. 2, of the Act the Court has power to rescind a contract, and in such a case would no doubt exercise such power. The balance of authority is in favour of the right to proceed a second time.

[In addition to the authorities mentioned in the note at the end of the judgment, the following were referred to: *Hartley* v. *Harman* (1); *Goodman* v. *Pocock* (2); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3)]

McCardie replied.

Cur. adv. vult.

July 3. The following written judgment (in which Wright J. concurred) was delivered by

HAWKINS J. This is an appeal against a judgment of a court of summary jurisdiction, given on January 6 last, ordering the appellant to pay to the respondents 10*l.* damages and costs.

By an agreement in writing, dated October 22, 1896, Evans & Co., the respondents, tube manufacturers at Birmingham, agreed to employ, and the appellant James agreed to serve them, in the capacity of working foreman, for the term of fifty-two weeks from the date thereof, at certain specified weekly wages.

James entered into the service of Evans & Co. under that agreement, and continued to serve them until November 16, when he left his work without any intention to return, and he has continually absented himself ever since.

On December 16, 1896, Evans & Co., under and by virtue of

(1) (1840) 11 A. & E. 798. (2) (1850) 15 Q. B. 576.
(3) (1884) 9 App. Cas. 434.

1897

JAMES v. EVANS & Co.

Hawkins J.

the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), took proceedings in the City of Birmingham Police Court against James to recover the sum of 10*l.* as damages by reason of his breach of contract in absenting himself from work from November 16, 1896, to the 28th of the same month. On December 23 that case was heard before the stipendiary magistrate for the said city, who gave judgment for Evans & Co. for the full amount claimed with costs.

On December 29, 1896, Evans & Co. commenced a second proceeding against James in the same court, claiming another sum of 10*l.* as damages for absenting himself from work from November 30, 1896, to December 12, 1896. On January 6, 1897, this second case was heard before the same magistrate, who again gave judgment for the respondents for the full amount claimed with costs. It is against this judgment this appeal is brought.

It was contended for the appellant, first, that the judgment in the second case was wrong, for the reason that the jurisdiction of the magistrate, being limited by the 4th section of the Act to 10*l.*, that jurisdiction was exhausted by the judgment in the first case. Secondly, that the claims in both proceedings were for one and the same cause of action, and that the respondents might and ought to have brought one action only, in the High Court or in a county court, to recover all or any damage done to them for breach of the agreement, and that it was not competent for them to bring a series of proceedings in the police court to recover damages for abstention from work during different periods of time covered by the same agreement.

I am of opinion that the first of these objections must prevail.

The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), is entitled "An Act to enlarge the powers of county courts in respect of disputes between employers and workmen, and to give other courts a limited civil jurisdiction in respect of such disputes." Sect. 3 is that which relates to the jurisdiction of county courts. It defines a dispute under that Act to be a "dispute between an employer and a workman arising out of

or incidental to their relation as such." It preserves to the county court its then existing jurisdiction, and in addition thereto, by sub-s. 1, confers upon it powers to adjust and set off, the one against the other, all claims, whether liquidated or unliquidated, and for wages, damages or otherwise, on the part either of the employer or the workman. By sub-s. 2 power is given to the county court to rescind any contract between the employer and the workman upon such terms as it thinks just.

Sect. 4 refers to the jurisdiction over such disputes of a court of summary jurisdiction. It enacts that such court, for the purposes of that Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages, and may exercise all or any of the powers by that Act conferred on a county court. Provided that in any proceeding in relation to such dispute the court of summary jurisdiction shall not exercise any jurisdiction where the amount claimed exceeds 10*l*.

The case of *Clemson* v. *Hubbard* (1) expressly decides that claims such as those now before us are disputes within the meaning of the statute.

In dealing with the first objection it is essential to consider what was the character and extent of the dispute between the parties to the first proceeding on December 16, 1896, when that case was commenced.

Now it is clear that both the periods of absence, in respect of which the two proceedings were commenced, had expired on the last-mentioned day, and the whole of the damages claimed in those two proceedings, to which Evans & Co. claimed to be entitled, might have been recovered in one action, and as one cause of action, whether brought in the High Court or a county court, or in the police court (if Evans & Co. had been willing to reduce their claim, so as to bring it within the limited jurisdiction of such a court), and I am of opinion that the whole claim for damages in respect of such continuous absence formed, at the expiration of that continuous period of absence, in fact and in law, one dispute only, and ought to have been

(1) (1876) 1 Ex. D. 179.

1897

JAMES v. EVANS & Co.

Hawkins J.

so treated, and I do not think it was competent for Evans & Co. to divide that one continuous period of absence into two periods of about a fortnight each, for the mere purpose of making it appear that there were two separate disputes between the parties, and thus harassing the workman with two proceedings.

The one dispute on the day of the commencement of the first proceeding was, as to the right of the workman to absent himself since November 16, and, if he had no such right, as he clearly had not, what damage had been sustained by his employers. There was no suggestion that there was any difference between any one day of the twenty-eight days of absence and the others.

I look upon the course pursued by the employers as a mere device and endeavour to give jurisdiction over a claim for 20*l.* by splitting it into two of 10*l.* each. I think we are enabled to defeat this device, and ought to do so.

I know it has been argued that the particulars in the first action were confined to the first half of the period of absence. To my mind they ought not to have been so, unless the employers intended to abandon the rest of their claim; and at all events they could not affect the workman's right to say, in answer to the second proceeding, that the jurisdiction of the magistrate was exhausted by his judgment in the first.

It may be, and I will assume (for the purposes of this case) the law to be, that each day's absence from his work, in breach of his contract, might, standing alone, be treated as a separate cause of action, but where there are a number of consecutive days of absence intervening between the first of those days and the bringing of the action for breach of contract, it is only one continuing breach of the one contract, which day by day becomes more extensive and of greater magnitude: each succeeding day of wrongful absence becomes incorporated with those which have preceded it, and so the breach assumes a more important aspect; but where, as in this case, the workman from the first by his conduct intimated his intention finally and absolutely to break his contract, and does so by leaving his service, it is but one breach, though each day's additional absence may add to the damages recoverable against him.

The case of *Grimbly* v. *Aykroyd* (1) may be usefully referred to upon this part of the case, as elucidating the principle upon which I have come to the conclusion at which I have arrived.

For the reasons I have given I think the appellant is entitled to our judgment. And it has become unnecessary for us to enter upon any discussion as to what the employers might have done had they sued in the High Court or the county court, nor is it necessary for us to look into futurity, or to offer any opinion as to what course is open to either of the parties so long as the agreement remains an existing undetermined contract. It would be useless therefore to discuss the various cases cited to us with reference to the second objection. (2)

There must be judgment for the appellant with costs.

Judgment for the appellant; leave to appeal refused.

Solicitors for appellant: *Harrison & Davies, for Hooper & Ryland, Birmingham.*

Solicitors for respondents: *Unett, Moore Bayley & Co., Birmingham.*

(1) (1847) 1 Ex. 479.

(2) *Ex parte Baker*, (1857) 7 E. & B. 697; 2 H. & N. 219; 26 L. J. (M.C.) 155, 193; *Youle* v. *Mappin*, (1861) 30 L. J. (M.C.) 234; *Unwin* v. *Clarke*, (1866) L. R. 1 Q. B. 417, at pp. 421–424, per Blackburn and Mellor JJ.; *Cutler* v. *Turner*, (1874) L. R. 9 Q. B. 502; *Barnsley* v. *Taylor*, (1867) 37 L. J. (Q.B.) 39; *Hochster* v. *De la Tour*, (1853) 2 E. & B. 678; *Brunsden* v. *Humphrey*, (1884) 14 Q. B. D. 141.

And the cases cited in *Cutter* v. *Powell*, 2 Sm. L. C. 1, at p. 46, 10th edition.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1897
June 28.

HOPE *v.* BRASH AND ANOTHER.

Practice—Discovery—Inspection of Documents—Libel in Newspaper—Original Manuscript—Discretion—Order XXXI., *r.* 18.

In an action against the proprietors of a newspaper for a libel published therein the defendants, who had admitted the publication of the libel and pleaded an apology and payment into court, stated in an affidavit of documents made by them that they had in their possession a manuscript which they objected to produce on the ground that it was the original contribution to them, and that which was published by them as admitted in their defence:—

Held, that an order ought not to be made for inspection by the plaintiff of the manuscript.

Hennessy v. *Wright*, (1888) 24 Q. B. D. 445, followed.

Bustros v. *White*, (1876) 1 Q. B. D. 423, considered.

APPEAL from an order made by a judge at chambers for inspection of a document as after mentioned.

The action was against the proprietors of a newspaper called the *West Cumberland Times* for a libel published in the Christmas number of their newspaper. The libel did not mention the plaintiff by name. The defendants in their statement of defence admitted the publication of the libel, and pleaded under 6 & 7 Vict. c. 96, s. 2, that the libel was inserted in their newspaper without actual malice and without gross negligence, and that before the commencement of the action they had inserted in their newspaper and in other newspapers a full apology for the libel, and they brought into court the sum of 5*l.* by way of amends for the injury, if any, sustained by the plaintiff through the publication of the libel, and alleged that that sum was sufficient to satisfy the plaintiff's claim in the action. In the apology published by them, they stated that they were astonished to find that the plaintiff's name had been connected with a paragraph that, so far as they were concerned, was in nowise directed at him. The plaintiff having obtained an order for discovery of documents, the defendants made an affidavit of documents, in which they stated that they had in their possession or power the documents relating to the matters in

question in the action, described in the schedule to the affidavit, among which was a document described as "a manuscript of the story published in the Christmas number of the *West Cumberland Times*," but they objected to produce the manuscript referred to on the ground that it was the original contribution to them and was that which was published by them as admitted in the statement of defence, and as to which they admitted responsibility. The plaintiff having given notice to the defendants to produce the manuscript for inspection under Order XXXI., r. 15, they refused to do so. On application at chambers by the plaintiff for inspection of the manuscript the master referred the matter to the judge, and the judge made an order for inspection.

J. E. Bankes, for the defendants. The defendants have disclosed this document in their affidavit, because it may be said in one sense to relate to the matters in question in the action; but it is not in truth relevant to any issue raised in the action, the publication of the libel being admitted, and the document being stated in the affidavit to be merely the original of the libel published, for which the defendants have accepted responsibility. Inspection of the document cannot really assist the plaintiff with regard to the issues raised on the pleadings.

[LORD ESHER M.R. The plaintiff's object may be to find out the original author of the libel.]

It is a question for the discretion of the Court whether under Order XXXI., r. 18, an order shall be made for inspection of documents set forth in an affidavit of documents. It was laid down in *Hennessy* v. *Wright* (1) that it was settled practice never to order production of such a document as that of which inspection is now sought.

Montague Lush, for the plaintiff. In *Hennessy* v. *Wright* (1) there was no issue to which the original manuscript was relevant, and it was not admitted to be relevant by the affidavit of documents, as is the case here. Here the defendants have themselves admitted in their affidavit that the document is relevant. The defendants in their apology assert that they did

(1) 24 Q. B. D. 445.

C. A. 1897

HOPE v. BRASH.

not know that the matter which they inserted in their newspaper related to the plaintiff, and they have pleaded that they published it without actual malice or gross negligence. The defendants have admitted that the document is relevant to the issue on that defence, and it may well be so in this way; the original manuscript may have editorial erasures or notes upon it tending to shew that the defendants knew to whom the libel referred. The plaintiff may have a difficulty in proving that the defendants knew that the plaintiff was the person referred to, and that they were actually malicious or grossly negligent, because the defendants may not go into the witness-box themselves, so as to give the plaintiff an opportunity of cross-examining them on the matter; and inspection of the document may assist him in this respect.

[LORD ESHER M.R. The onus of proving their defence rests entirely on the defendants, and, if they do not prove it, the jury will be told to treat the case as if no such defence existed.]

It is submitted that the Court has no discretion, but is bound to allow inspection where a document is admitted to be relevant: *Bustros* v. *White*. (1) Assuming that there is a discretion, the learned judge at chambers exercised his discretion, and this Court will not interfere unless they can clearly see that he has exercised it wrongly. The plaintiff is willing to undertake not to sue the author of the manuscript.

J. E. Bankes, in reply. The rules as to discovery and inspection of documents have been altered since the decision in *Bustros* v. *White*. (1) That decision turned on Order XXXI., r. 11, of the old rules which corresponds with Order XXXI., r. 14, of the present rules. The rule under which inspection is applied for in the present case is Order XXXI., r. 18, and by the proviso added to that rule by the Rules of November, 1893, the order for inspection is not to be made if the Court or a judge is of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

LORD ESHER M.R. I am of opinion that it was a matter of discretion for the judge, and is a matter of discretion for us,

(1) 1 Q. B. D. 423.

C. A. 1897

HOPE v. BRASH.

Lord Esher M.R.

whether an order for inspection should be made. In this case an action for libel has been brought by the plaintiff against the defendants, who are the proprietors of a newspaper; and the defendants have in their defence admitted the publication of the libel complained of, and have pleaded a plea which, by statute, if it can be proved, will be a defence to the action. The plaintiff has applied for an order for inspection, not of the libel complained of which was in the newspaper, but of the original manuscript sent by a contributor to the defendants. It is clear that the burthen of proof with regard to the defence pleaded lies wholly on the defendants, and, unless the defendants prove the whole of it, that defence comes to nothing, and the jury ought to be told to consider the case as if no such defence had existed. The question is whether under these circumstances the plaintiff ought to be allowed to inspect the manuscript in question. It appears to me that in the case of *Hennessy* v. *Wright* (1) the very same question in substance as that in the present case came before the Court of Appeal, namely, whether the defendant in an action for a libel published in a newspaper ought to be forced to disclose who it was that supplied him with the materials for the libel which had been published. To the judgment in that case I was a party; and Lindley L.J., after being informed that the general practice of the judges of the Common Law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and Lopes L.J. Therefore in that case the Court of Appeal recognised the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the Court will never under any circumstances allow such inspection, but, in the exercise of its discretion, it will not, as a general rule, in the absence of any special reason to the contrary, allow it. The objection to produce this document taken in the defendants' affidavit appears to be founded upon the rule laid down in that

(1) 24 Q. B. D. 445.

C. A. 1897

HOPE v. BRASH.

case. There seems to me to be nothing peculiar in this case to take it out of that general rule; and therefore I think that the learned judge ought to have exercised his discretion in conformity with that rule and that this appeal should be allowed.

A. L. SMITH L.J. I am of the same opinion. This is an action for libel against the proprietors of a newspaper. The defendants in answer to the action set up a statutory defence. They admit the publication of the libel, and plead that they published it without actual malice and without gross negligence, that they have published an apology, and that they bring 5*l.* into Court as sufficient to satisfy the plaintiff's claim. It is clear that it lies upon the defendants to prove this defence. The plaintiff having obtained an order for discovery of documents, the defendants in their affidavit of documents admit that they have in their possession or power, among other documents relating to the matter in question, the original manuscript of the libel which was published by them. The counsel for the plaintiff contended that the case of *Bustros* v. *White* (1) was conclusive to shew that, where the party making an affidavit of documents has admitted the relevancy of a document in his possession, the Court is bound to allow inspection of it by the other party. That case was decided, not upon the rule now in question, but upon Order XXXI., r. 11, of the old rules, which corresponds to Order XXXI., r. 14, of the present rules. But since that decision additions have been made to rules 12 and 18 of Order XXXI. for the express purpose of making it not compulsory on the Court to order discovery or inspection if the Court does not think it necessary. Therefore, as the matter now stands, I am of opinion that it is not obligatory to order inspection. It has been the ordinary rule of practice, as laid down by Lindley L.J. in *Hennessy* v. *Wright* (2), that in a case such as this, an order will not be made by which the plaintiff may obtain discovery of the name of the person who originally wrote the libel published in a newspaper. I do not say that the rule so laid down is one which can never be

(1) 1 Q. B. D. 423. (2) 24 Q. B. D. 445.

departed from, but there must be something exceptional to take a case out of it. The counsel for the plaintiff contended that there were in this case special reasons for departing from the rule, but he failed entirely to convince me that this was so. In my opinion the learned judge came to a wrong conclusion, and this appeal should be allowed.

RIGBY L.J. I am of the same opinion. The admission made by the defendants' affidavit of documents is simply that they have in their possession the original manuscript of which the libel published was merely a copy. It is suggested that the document may contain something more than the libel which was published, but that is really a suggestion that the affidavit is a dishonest one, of which there is no proof whatever. It does not appear to me that the plaintiff is entitled to inspection of the document on the bare possibility that what is so suggested may be the case. With regard to the general law on the subject, I wish to observe that in the case of *Bustros* v. *White* (1), which was relied upon by the plaintiff's counsel, it appears to have been admitted on all hands that the documents in question were relevant, and the question raised was as to the existence of privilege. All that was decided there was that, where a document is plainly relevant, it must in the absence of privilege be produced. Independently of the law laid down in *Hennessy* v. *Wright* (2), I doubt whether a case for inspection was here made out; but in that case an exception from the general law as to discovery was made in the case of libel, and I am bound by the rule there laid down. I agree in the view that the alterations made in the terms of the rules with regard to discovery indicate that discovery is not now intended to be always or indeed in any case a matter to be allowed ex debito justitiæ. That appears to me to be shewn by the proviso to rule 12 of Order XXXI. with regard to discovery of documents. And again, when we come to rule 18, which is the rule applicable to this case, we find a similar proviso with regard to inspection. The party asking for inspection of a document must make out that the document is relevant. If the contents of a document

(1) 1 Q. B. D. 423. (2) 24 Q. B. D. 445.

C. A. 1897

HOPE v. BRASH.

Rigby L.J.

are unknown to the Court, and the party against whom inspection is sought has admitted that the document is relevant, of course it must be treated as such. But, when, as in the present case, the contents of the document are known to the Court from the affidavit, the mere suggestion that the document may possibly contain something more than what is stated does not seem to me sufficient to justify the Court in ordering inspection.

Appeal allowed.

Solicitors for plaintiff: *Harrison & Powell, for Brown & Auld, Whitehaven.*

Solicitors for defendants: *Speechly, Mumford, Landon & Rodgers, for Hayton & Simpson, Cockermouth.*

E. L.

1897
April 2.

ROWELL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Debenture—Principal Sum repayable with Premium—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Sched. I.*

A limited company issued a series of debentures of 100*l.* each, each debenture containing an undertaking by the company to pay to the registered holder upon a specified date "the sum of 100*l.* together with a premium thereon at 7*l.* 10*s.*" The debentures were marketable securities not transferable by delivery within the meaning of Sched I. of the Stamp Act, 1891:—

Held, that each debenture was a security for the payment by the company of 107*l.* 10*s.*, the amount of the principal and the premium, and was therefore liable to ad valorem stamp duty upon that amount.

CASE stated by the Commissioners of Inland Revenue under 54 & 55 Vict. c. 39, s. 13.

A debenture had been presented on behalf of the appellants, the issuers thereof, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for their opinion as to the stamp duty with which it was chargeable. It was one of a series of debentures for securing principal sums not exceeding 60,000*l.*, and the portion

of it which is material to the present case was in the following terms:—

"John Rowell & Sons, Limited.

"Issue of 600 debentures of 100*l.* each at 105*l.* per cent. carrying interest at the rate of 4*l.* per cent. per annum, and all ranking pari passu in security.

"Number 373. Debenture.

"1. John Rowell & Son, Limited (hereinafter called 'the company') will on September 30, 1911, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to of or other the registered holder for the time being hereof the sum of 100*l.*, together with a premium thereon at 7*l.* 10*s.*"

The debenture then provided for payment of interest, and charged certain of the property of the company with payments of principal and interest, but it is unnecessary further to set out the debenture or the conditions indorsed thereon.

The debenture was issued by the appellants at 105*l.*, and was capable of being sold in a stock market in the United Kingdom.

The commissioners were of opinion that it fell within division (B) of the following head of charge in the first schedule of the Stamp Act, 1891, namely:—

"Marketable Security.

"(1.) Marketable security (A) being a colonial government security or (B) being a security not transferable by delivery or (C) being a security transferable by delivery and bearing date or signed or offered for subscription before or on the sixth day of August, 1885—

"For or in respect of the money thereby secured . .	The same ad valorem duty according to the nature of the security as upon a mortgage."

They were further of opinion that the money secured by the

1897

ROWELL v. INLAND REVENUE COMMISSIONERS.

instrument within the meaning of the said head of charge was the sum of 107*l.* 10*s.*, and accordingly assessed the instrument as liable to the duty of 3*s.* 9*d.*, being the duty payable upon a mortgage of that amount.

The questions for the opinion of the Court were:—

(1.) Whether the instrument was chargeable with the duty of 3*s.* 9*d.* in accordance with the assessment of the commissioners.

(2.) If not, with what duty the instrument was chargeable.

Lawson Walton, Q.C. (*J. E. Bankes* and *R. V. Bankes* with him), for the appellants. Assuming that this debenture is a marketable security, it is not a security for a greater sum than 100*l.* It is liable to the same ad valorem duty as upon a mortgage—that is, 2*s.* 6*d.*, under the head "mortgage, bond, debenture, covenant," it being the primary security for the payment or repayment of money not exceeding 100*l.* Being liable to duty as a mortgage, the amount for which the instrument is security depends upon s. 86 of the Stamp Act, 1891, where "mortgage" is defined as meaning "a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid. . . . ." The 7*l.* 10*s.* was not money "advanced or lent at the time," and the debenture cannot be treated as security for that amount. The premium of 7*l.* 10*s.* is in fact a fetter on the exercise by the company of its right of redeeming the debenture at par; it is not money secured by the debenture. [He cited *Wroughton* v. *Turtle.* (1)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Danckwerts* with him), for the respondents. The sum secured is on the face of the debenture the sum of 100*l.*, its nominal amount, together with the premium of 7*l.* 10*s.*; the premium is part of the money secured by the debenture. The only question is whether the premium comes within the expression "thereby secured" in the description of "marketable security" in the schedule to

(1) (1843) 11 M. & W. 561.

the Act of 1891. The reference to the heading "mortgage, bond, debenture, covenant" in the schedule is only for the purpose of fixing the scale of ad valorem duty; it does not follow that this instrument is to be treated as a mortgage, and as being security for nothing more than would be the case with a mortgage; if, however, it is to be treated as a mortgage, it fulfils the requirements of s. 86, and is a security for the payment of money, that is, the money lent and the premium.

R. V. Bankes, in reply, cited *Barker* v. *Smark* (1); *British India Steam Navigation Co.* v. *Inland Revenue Commissioners*. (2)

VAUGHAN WILLIAMS J. The question which we have to decide in this case is whether the 7*l.* 10*s.*, plus the 100*l.*, is to be treated as money for the payment or repayment of which these debentures are security, or whether the security is to be treated as limited to the payment or repayment of 100*l.* I have persuaded myself, but not entirely without difficulty, that the whole 107*l.* 10*s.* may be treated for this purpose as money the payment or repayment of which is secured by the debentures; but inasmuch as I have arrived at the conclusion for different reasons from those which were urged on behalf of the Crown, I think it is better that I should state those reasons.

Now, these debentures are marketable securities, and it is said in regard to marketable securities that an ad valorem duty is to be paid for or in respect of the money thereby secured, and that duty is to be a duty according to the nature of the security as upon a mortgage. Then if we turn to a later part of the schedule we find the heading "mortgage, bond, debenture, covenant . . . . being the only or principal or primary security . . . . for the payment or repayment of money." It seems to me that the scale which is so applied is a uniform scale; but although the scale is uniform, the subject-matter to which it is applied may vary—that is to say, that when one has to inquire what moneys are secured by a mortgage, what by a bond, what by a debenture, what by a covenant, sums of money which would be held not to be secured by mortgage

(1) (1841) 7 M. & W. 590. (2) (1881) 7 Q. B. D. 165.

1897

ROWELL v. INLAND REVENUE COMMISSIONERS.

Vaughan Williams J.

might yet be held to be secured by bond, debenture, or covenant. And with regard to debentures, one knows that a debenture is spoken of as a security, even though it is a mere acknowledgment of a debt, and there is no material security accompanying the debenture or included in it at all; and it may very well be that a particular sum payable would not, if the security was a mortgage, be treated properly as payable under that security, and yet would be treated as secured by a debenture or a covenant. In my judgment, if this instrument had been a mortgage, the argument for the appellants would be sound. I think that one can only treat as secured by a mortgage debts or sums which come within the definition of a mortgage in s. 86, and if I had thought that that definition of a mortgage controlled the whole scale here, I should have been disposed to give judgment in favour of the appellants and against the Crown. But this is not a case of a mortgage: it is the case of a debenture; and I do not think that the definition of a mortgage in s. 86 controls what may or may not be included in the money secured by a debenture. I think, therefore, that this 7*l.* 10*s.* is properly to be treated as secured by the debenture; and therefore I think that, in applying the ad valorem scale, one must take the amount secured as exceeding 100*l.* If in this particular case there had been an option about the payment of the 7*l.* 10*s.*, that is to say, if there had been no time fixed at which the company were bound to redeem the debenture at 107*l.* 10*s.*, but only an option given to them at any time to pay off the debenture, if they thought fit to pay the premium of 7*l.* 10*s.*, I should have said that the 7*l.* 10*s.* was not included in the money secured by the debenture, but that it was a mere price paid for the privilege of redeeming. But in this particular case not only is there an undertaking to redeem at 107*l.* 10*s.* on a fixed date, but also I find that, if the company makes default in the payment of interest so that the debt becomes immediately enforceable, the principal moneys to be repaid are 107*l.* 10*s.*, and not 100*l.*

For these reasons I think that the Crown must succeed, and the ad valorem duty is, therefore, payable upon an amount exceeding 100*l.*

KENNEDY J. I agree, and I prefer to base my judgment entirely on the ground that my learned brother has expressed. With regard to the question whether, if this had been a mortgage, the argument for the appellants could have prevailed, I must withhold my opinion.

Judgment for the Crown.

Solicitors for appellants: *Stokes & Stokes.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

[CROWN CASE RESERVED.]

1897
May 15.

THE QUEEN *v.* DAVIES.

Gaming—Common Gaming House—User of House or Room for Unlawful Gaming—Gaming Houses Act, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

By s. 4 of the Gaming Houses Act, 1854, "any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein," is made liable on summary conviction to a penalty not exceeding 500*l.*

The defendant, with three friends whom he met, went to his house for the purpose of having a game of cards; after playing whist, they played for money a game called "German Bank," which the jury found to be an unlawful game. There was no evidence that they or any one else had ever played an unlawful game of cards at the defendant's house on any other occasion:—

Held, that the defendant could not be convicted under the above section of using the house or room for the purpose of unlawful gaming being carried on therein:

Held, also, that the question whether a particular game of cards is an unlawful game is a question of law for the judge, and not of fact for the jury.

CASE stated by the chairman of the Cheshire Quarter Sessions.

The defendant Davies had been tried with two other men, named Wild and Baker, upon an indictment containing eight counts, and charging Davies with opening and using a house and room for unlawful gaming, and the other men with aiding and abetting. Wild and Baker were acquitted, and Davies was found guilty upon the third and seventh counts only. The third count, which was against the defendant Davies alone,

1897

REG. v. DAVIES.

charged him with being the occupier of a certain house and unlawfully using the said house for the purpose of unlawful gaming being carried on therein; the seventh count, also against him alone, was in similar form, but substituted the words "room in a certain house" for "house." The first and fifth counts charged the defendant with opening the house and room for the purpose of unlawful gaming, and the four remaining counts charged the other men with aiding and abetting; but on all these a verdict of not guilty had been returned. The facts shewn in the evidence were shortly as follows:—

Wild kept an inn at Stockport, and on the evening of December 6 the three defendants and a man named Chappell were all on the premises; they all knew each other before. At closing time it was suggested that they should go somewhere and have a game, and they went to the house of Davies, who had a shop and house in Chestergate. Davies got a pack of cards out of the shop, and they started playing whist; but after three games Chappell was dissatisfied with his partner and something more lively was proposed; ultimately they played a game called "German Bank," which it is unnecessary here to describe, and later on they played Napoleon. They played for some hours; Chappell, after losing all the money he had with him, borrowed 10*l.* from Baker, giving him a cheque for it, and lost that money also. The defendant Davies was not a winner during the play. They drank some whisky which had been bought at Wild's, and for which all four paid.

At the close of the case for the prosecution the defendant's counsel submitted that there was no case to go to the jury, that there was no proof of any habitual opening or user of the house or room for the purpose of unlawful gaming, and that the proof of having once so opened or used it was not opening or using it in the sense necessary. [He referred to *Haigh* v. *Sheffield Town Council* (1) and *Jenks* v. *Turpin*. (2)]

The learned chairman put certain questions to the jury as to the defendant Davies, which, with the answers of the jury, were as follows:—

(1.) Was the defendant the occupier of the house or room?—Yes.

(1) (1874) L. R. 10 Q. B. 102. (2) (1884) 13 Q. B. D. 505.

(2.) Did he open them on the occasion in question for the purpose of unlawful gaming?—No.

(3.) Did he use them on the occasion for the purpose of unlawful gaming?—Yes.

(4.) Was the game of "German Bank" as played on the occasion in question an unlawful game?—Yes.

(5.) Was the house used as a common gaming house, or was it on the evidence only used on the occasion in question for the purpose of playing an unlawful game?—It was used as such only on the occasion.

Upon these findings a verdict of guilty was entered against the defendant on the third and seventh counts and of acquittal on the rest. Sentence was postponed and the defendant admitted to bail.

The question for the opinion of the Court was whether the conviction on either of the counts on which a verdict of guilty was entered could be sustained.

E. Honoratus Lloyd, for the prosecution.

The defendant did not appear.

LORD RUSSELL of KILLOWEN C.J. I am of opinion that this conviction cannot possibly be supported. The facts seem to be that these four men, who were not strangers to each other, but on the contrary were friends, were talking and drinking at Wild's public-house, and that at closing time it was suggested that they should go to Davies' house and have a game of cards; they agreed to do so, and took with them some whisky and some stout, for which they all paid. Davies, thinking perhaps that his wife would not approve, went on first and sent her to bed. When they got there they sat down and played whist, and they would probably have gone on playing that game but for the fact that Chappell had cut Wild as a partner and was dissatisfied with his play. However, after a time they decided to try something else, and began playing a game called "German Bank." The nature of this game is not very clearly explained in the case; but it does appear that though the prosecutor, Chappell, lost, Davies, the defendant,

1897

REG. v. DAVIES.

Lord Russell C.J.

won nothing at all. Then the prosecutor, for the purpose of paying what is called a debt of honour, wrote out a cheque which was seen by his wife, who put the police in motion. Those are in substance the facts of the case, and, looking to the purpose of the Act under which this prosecution is instituted, it is in my opinion monstrous to say that the case falls at all within the mischief or within the provisions of the statute, which was intended to prevent the user of a house as a gaming house. As far as appears from the case, neither these people nor anybody else had ever played at the house before. In my judgment it is impossible to say that the defendant kept, opened, or used the house for the purpose of playing an unlawful game within the meaning of the statute, and on that ground alone the conviction cannot stand. But, further, it appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of "German Bank," as played there, was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge; here there seems to have been no direction as to the law in the summing-up. The conviction must therefore be quashed.

There is one further circumstance which should be noticed. It is for the jury to determine whether a person is guilty or not guilty upon directions as to points of law by the judge; here, however, they appear not to have pronounced a verdict of guilty or not guilty at all. It is true that it is still sometimes the practice to ask the jury to give special findings upon the facts, but it is ordinarily a safer and better course to get the opinion of the jury as to whether the accused is guilty or not guilty, the judge directing them upon the law.

HAWKINS, GRANTHAM, WRIGHT and COLLINS JJ. concurred.

Conviction quashed.

Solicitor for the prosecution: *P. G. Robinson, for Brown & Co., Stockport.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1897
July 1.

THE QUEEN ON THE PROSECUTION OF ISIDORE SPERO *v.* THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM.

Medical Practitioner—Dentist—Right to be Registered—Qualification—Articled Pupil at passing of Act—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 6 (*c*), 7, 37.

By s. 6 (*c*) of the Dentists Act, 1878, any person at the passing of the Act bonâ fide engaged in the practice of dentistry is entitled to be registered under the Act. By the proviso in s. 7 a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless, before August 1, 1879, he makes a declaration in the form in the schedule to the Act, or to the like effect. The form declares that the applicant was bonâ fide engaged in the practice of dentistry at the date of the passing of the Act. By s. 37 a person who has been articled as a pupil shall, if his articles expire before January 1, 1880, be entitled to be registered as though he had been in bonâ fide practice before the passing of the Act.

A person who was, at the time of the passing of the Act, articled as a pupil within the meaning of s. 37, applied to have his name placed upon the Dentists' Register. He had not made the declaration required by s. 7 :—

Held, affirming the judgment of the Queen's Bench Division, that the proviso in s. 7 applies to persons whose qualification is given by s. 37, and that, therefore, the applicant, not having made the declaration, was not entitled to be registered.

APPEAL from a judgment of the Divisional Court, reported [1897] 1 Q. B. 764, discharging an order nisi which had been obtained calling upon the General Council of Medical Education and Registration of the United Kingdom to shew cause why a writ of mandamus should not issue commanding them to place upon the Dentists' Register the name of the prosecutor, Isidore Spero.

At the date of the passing of the Dentists Act, 1878 (July 22, 1878), the prosecutor was articled as a pupil and had paid a premium to a dental practitioner entitled to be registered under the Act in consideration of receiving from such practitioner a

C. A. 1897

REG. v. MEDICAL COUNCIL.

complete dental education. The articles were for a period of three and a half years, expiring on October 13, 1878. The prosecutor did not produce or transmit to the registrar before August 1, 1879, the declaration required by s. 7 of the Dentists Act, 1878, and he did not apply to be registered until several years later, when the General Council refused to place his name on the register.

The Divisional Court discharged the order nisi (1) on the ground that the prosecutor was not entitled under s. 37 (2) to be registered.

The prosecutor appealed.

T. Willes Chitty (*Bigham, Q.C.*, with him), for the prosecutor. The prosecutor is entitled to be registered, as he comes within the exact words of s. 37, and that section has not the effect of applying to his case the proviso in s. 7. That proviso, which deals with the procedure necessary for registration, applies only to persons qualified under s. 6, sub-s. (*c*), namely, persons who are at the passing of the Act bonâ fide engaged in the practice of dentistry. The form in the schedule is wholly inapplicable to persons qualified under s. 37. If the decision

(1) [1897] 1 Q. B. 764.

(2) 41 & 42 Vict. c. 33, s. 6: "Any person who . . . . (*c*) is at the passing of this Act bonâ fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy, shall be entitled to be registered under this Act."

Sect. 7: ". . . . Provided that a person shall not be registered under this Act as having been at the passing thereof engaged in the practice of dentistry unless he produces or transmits to the registrar, before the first day of August, one thousand eight hundred and seventy-nine, information of his name and address and a declaration signed by him in the form in the schedule to this Act or to the like effect . . . ."

Sect. 37: "Any person who has been articled as a pupil and has paid a premium to a dental practitioner entitled to be registered under this Act in consideration of receiving from such practitioner a complete dental education, shall, if his articles expire before the first day of January, one thousand eight hundred and eighty, be entitled to be registered under this Act as though he had been in bonâ fide practice before the passing of this Act. . . ."

The form of declaration in the schedule is as follows: "I ——, residing at ——, hereby declare that I was bonâ fide engaged in the practice of dentistry at —— at the date of the passing of the Dentists Act, 1878."

of the Divisional Court is right, then a pupil whose articles expired on or after August 1, 1879, and before January 1, 1880, could not get registered at all, as he could not have made the prescribed declaration before August 1, 1879.

Muir Mackenzie, for the defendants. The judgment of the Divisional Court and the reasons given for that judgment are right. Sect. 37 gives a qualification to certain articled pupils who are to be considered as coming within s. 6, sub-s. (*c*), and to whom the proviso in s. 7 is to apply. The intention of the Act was to give that qualification to pupils whose articles had been current for some time when the Act passed. It placed them in the same position as persons who had been in bonâ fide practice at the passing of the Act. As regards the suggested difficulty of an articled pupil making the declaration in the schedule, by s. 7 he could have made one "to the like effect"; and any pupil whose articles were current at the passing of the Act could have made the necessary declaration before August 1, 1879, though his articles did not expire until after that date and before January 1, 1880.

T. Willes Chitty, in reply. By s. 5 a person registered under the Act is entitled to practice. It was never intended that a pupil should be entitled to get registered and to practice.

LORD ESHER M.R. In this case it is clear that the prosecutor comes within the provisions of s. 37, and we must accordingly consider what is the true interpretation of that section, and what is the result of his coming within it. That section enacts that a person in the position of the prosecutor is entitled to be registered under the Act "as though he had been in bonâ fide practice before the passing of this Act." It is, therefore, not a simple enactment that a person in the position of the prosecutor is entitled to be registered; it is an enactment that he is to be in the same position, so far as registration is concerned, as though he had been in bonâ fide practice before the passing of the Act. That brings me to s. 6, and I must see what would have been his position if he had been in bonâ fide practice before the passing of the Act. Sect. 6 entitles

C. A. 1897

REG. v. MEDICAL COUNCIL.

Lord Esher M.R.

such a person to be registered under the Act; but the matter does not end there, because the proviso to s. 7 is material. By that proviso a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless he produces or transmits to the registrar, before August 1, 1879, a declaration signed by him in the form in the schedule or to the like effect. The prosecutor has not fulfilled that condition. He did not transmit any declaration. The particular form of declaration given in the schedule is not essential; the declaration may be "to the like effect." The prosecutor has not brought himself within the proviso of s. 7, and is not entitled to be registered. As regards the suggested difficulty in the case of persons whose articles expired on or after August 1, 1879, and before January 1, 1880, I can only say that we cannot put the prosecutor in a better position merely because the Act may have—I do not say that it has—placed some other persons in a position which has rendered it impossible for them to make the prescribed declaration. The words of the Act are plain, and what he has to do is plain; and that he has not done. In my opinion, the judgment was right, and the appeal must be dismissed.

A. L. SMITH L.J. In my opinion the judgment of the Divisional Court must be affirmed. The prosecutor's case comes within s. 37, and we must look at that section to see what are his rights as regards registration under the Act. That section provides that an articled pupil shall, if his articles expire before January 1, 1880, be entitled to be registered under the Act as though he had been in bonâ fide practice before the passing of the Act. The prosecutor applied to be registered under that section. The point taken against him is that he has not made the declaration required by s. 7. It seems to me that s. 37 is explicit as to articled pupils, who are placed as regards registration in the same position as if they were in bonâ fide practice before the passing of the Act. I turn back to ss. 6 and 7 to see what that position is: s. 6 prescribes the necessary qualifications for registration; sub-s. (*c*) says that any person who is at the passing of the Act bonâ fide engaged in the practice of

dentistry or dental surgery shall be entitled to be registered under the Act. That is the qualification. Then comes s. 7, which says, in the proviso, that a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless he sends to the registrar before August 1, 1879, information of his name and address, and a declaration signed by him in the form in the schedule to the Act, or to the like effect. That section imposes a limit of time within which such a person must produce to the registrar the documents above specified. The prosecutor could have done that perfectly well. He could have sent to the registrar between October 13, 1878, and August 1, 1879, a declaration "to the like effect," modified to fit his case, and so could have complied with the requirements of the section. In my opinion he ought to have sent in his declaration by August 1, 1879. I am not going to embark on the question as to what would have been the result if his articles had expired after August 1, 1879, and before January 1, 1880. A difficulty would then have arisen as to the form of the declaration to be sent in before August 1, 1879. That case does not now arise. The prosecutor is not entitled to be registered, as he did not send in the required documents before August 1, 1879. He cannot, therefore, ask for a mandamus to compel the General Council to register his name, and the appeal must be dismissed.

CHITTY L.J. The Dentists Act, 1878, establishes a register of dentists, and it prescribes certain qualifications, and says that after August 1, 1879, no one is to call himself a dentist, speaking in general terms, unless he is on the register. The qualifications necessary for registration are set forth in s. 6, and there is a qualification added by s. 37. The prosecutor brings himself within s. 37, and a person who comes within that section "shall, if his articles expire before the 1st day of January, 1880, be entitled to be registered under this Act as though he had been in bonâ fide practice before the passing of this Act." The words, "as though he had been in bonâ fide practice before the passing of this Act," are, on the face of them, referential words, and we must look back to some other

C. A. 1897

REG. v. MEDICAL COUNCIL.

Chitty L.J.

part of the Act to see to what reference is made. The enactment does not fit in very neatly, but it is plain that it is to sub-s. (*c*) of s. 6 that the reference is made. That section enacts that any person who is at the passing of the Act bonâ fide engaged in the practice of dentistry shall be entitled to be registered under the Act. There is a difference in the language of the two sections, the words in s. 6, sub-s. (*c*), being, "at the passing of this Act," while the words in s. 37 are, "before the passing of this Act." But I do not think that anything can be made of that slight alteration in the wording, and it is plain to me that s. 37 must refer to sub-s. (*c*) of s. 6. Sect. 6 only says who are entitled to be registered under the Act, and s. 7 goes on to prescribe what must be done in order to get on the register. The material part of s. 7, so far as regards this case, is the proviso, and that proviso refers to sub-s. (*c*) of s. 6. The person mentioned in the proviso is bound to send to the registrar a declaration before August 1, 1879, and the declaration is to be in the form set forth in the schedule, or to the like effect. The point taken is that, reading s. 37 and the schedule together, the prosecutor, who was a pupil when the Act passed, could not have made the declaration in that form. In my opinion, the words "to the like effect" justify the Court in saying that the declaration may be modified to suit the facts. On the face of the Act, it appears to be fairly plain that s. 37 was introduced after the main provisions had been settled, and that out of that circumstance arise any such difficulties as may exist in construing the Act and making its different parts consistent with each other. I have no difficulty in saying that the prosecutor could have made a properly modified declaration, and so could have got his name upon the register. The time limited by s. 7 seems to me to be of very great importance, because the qualification required was not intended to be a stale qualification, but the applicant for registration must be a bonâ fide practitioner. If the prosecutor's contention is correct, he could have delayed for any number of years before making his application to be registered; he could have engaged in all kinds of business apart from dentistry, and yet apply to be registered as having a qualification within the Act. I think

that the good sense of the case and the words of the Act are against him.

Appeal dismissed.

Solicitor for prosecutor: *Bertram Jacobs.*
Solicitors for defendants: *Farrer & Co.*

A. M.

GRAND JUNCTION WATERWORKS COMPANY, APPELLANTS *v.* DAVIES, RESPONDENT.

1897 *June* 19; *July* 3.

Waterworks—Rate—Annual Value—Assessment—"Tenement supplied with Water"—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 68.

On an application, under s. 68 of the Waterworks Clauses Act, 1847, to determine a dispute as to the value of a tenement supplied with water, consisting of a dwelling-house and garden with outhouses, occupied as a residence, and comprising about half an acre, the justices found as a fact that a portion of the garden might be separately let, and being of opinion that, in arriving at the annual value of the tenement supplied with water, they had to determine what quantity of garden should reasonably go with the house, they held that the annual value was the value of the premises exclusive of such portion as might be separately let.

On a case stated:—

Held, that the justices had no jurisdiction to exclude that portion of the garden, and the assessment must be raised to the annual value of the whole of the premises as occupied.

CASE stated by justices.

The appellants and the respondent appeared before the justices upon an application by the respondent under s. 68 of the Waterworks Clauses Act, 1847 (1), to determine the value

(1) 10 & 11 Vict. c. 17, s. 68: "The water rates, except as hereinafter and in the special Act mentioned, shall be paid by, and be recoverable from, the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

By the Grand Junction Waterworks Act, 1852 (15 & 16 Vict. c. clvii.), s. 46, it is enacted that the appellant company "shall, at the request of the owner or occupier of any house in any street within the limits of this Act, in which any pipe of the company shall

1897

GRAND JUNCTION WATERWORKS COMPANY v. DAVIES.

of a certain tenement known as No. 1, Grange Road, Ealing, supplied with water by the appellants, and owned and occupied by the respondent, a dispute having arisen as to such annual value between the appellants and the respondent. The tenement was outside the area to which the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34), applies.

The Waterworks Clauses Act, 1847 (except the provisions with respect to the communication-pipes to be laid by the undertakers and except s. 35), is incorporated with the Grand Junction Waterworks Act, 1852.

The premises known as No. 1, Grange Road, Ealing, consist of a dwelling-house, with a gravelled approach in front, and garden at the back consisting in part of lawn and in part of kitchen-garden with greenhouse and tool-shed. The whole of the premises was occupied by the respondent as a residence, and the garden and the other above-mentioned appurtenances formed part of the curtilage of the house. The total area of the premises was a little over half an acre.

The appellants supplied the respondent with water for domestic purposes, under and in pursuance of s. 46 of the Grand Junction Waterworks Act, 1852, and s. 68 of the Waterworks Clauses Act, 1847, at a rate according to the annual value of the tenement supplied with water. The respondent

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be laid," furnish a supply of water for domestic purposes, where the annual value of the dwelling-house or other place supplied shall not exceed 200*l.*, at a rate per centum per annum on such value not exceeding 4*l.*

By s. 48, "A supply of water for domestic purposes shall not include a supply of water for (inter alia) horses, cattle or for washing carriages, or for gardens, fountains, or ornamental purposes."

By s. 49, "The company may supply any person or body within their limits with water to be used within such limits for other than domestic purposes, at such rate, and upon such terms and conditions, as shall be agreed upon between the company and the person or body requiring such supply."

By s. 50, "The company may, at their own instance, and shall, at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service-pipe of the company shall be laid, and who requires a supply of water by measure, for purposes other than the purposes in respect of which rates are by this Act provided or limited, ... afford a supply of water . . . . and may charge for such supply" certain specified rates.

had also under threat of legal proceedings paid to the appellants for the use of water for garden purposes during the season of 1896 the sum of 1*l.* 1*s.*, but no agreement under s. 49 of the Grand Junction Waterworks Act, 1852, was entered into between the parties for the supply of water for garden purposes.

Paragraph 9. The question at issue between the respondent and the appellants was as to what was to be taken into account in determining the annual value of the "tenement supplied with water."

For the appellants it was contended that the tenement, the annual value of which was to be determined by the justices, was the whole area of the premises occupied by the respondent as one undivided tenement.

For the respondent it was contended that the tenement, the annual value of which was to be determined by the justices, was the dwelling-house alone, and that the garden ought to be excluded in calculating the annual value of "the tenement supplied with water," and the respondent's witnesses, in order to shew that the garden might have a letting value apart from the house, suggested that, by making entrances and dividing off the premises into three separate parts, the part of the garden consisting of lawn might be let as a lawn-tennis ground, the remainder of the garden, consisting of kitchen-garden, might be let as a kitchen-garden, and the dwelling-house would then stand with only a small piece of ground attached to it. It was asserted by the appellants' witnesses that such suggestion, even if possible, would, if carried out, completely alter the character of the premises, and greatly decrease the letting value thereof.

The justices found as a fact that the annual value of the whole tenement, as occupied by the respondent, was 100*l.*; but the annual value of such tenement, if a certain portion of the garden fronting on the Grange Road be excepted, was 80*l.*

The justices found as a fact that the piece of garden, although occupied by the respondent as part of the premises, and not divided or separated in any way, and though desirable for the enjoyment of the premises, might have been separately let.

The justices were of opinion that neither the respondent's

1897

GRAND JUNCTION WATERWORKS COMPANY v. DAVIES.

nor the appellants' contention was correct, and that, in arriving at the annual value of the tenement supplied with water, they had to make a special assessment for water purposes only for the purpose of a domestic supply, and were therefore obliged to determine what quantity of garden should in their opinion reasonably go with the house.

The justices were further of opinion that, in order to determine the annual value of the tenement under the section, they ought to consider that the garden was by the statute expressly excluded from receiving water under the head of domestic purposes, and that under *Bristol Waterworks Co.* v. *Uren* (1), and the cases therein cited, a reasonable amount of garden must be included in the assessment on which the charge for water for domestic supply was levied.

The justices were further of opinion that in fixing the fair annual value of the premises they were not of necessity bound to accept that identical or particular unit for their assessment, upon which an annual value had been fixed under 6 & 7 Will. 4, c. 96 (2), or by the Surveyor of Queen's Taxes, or to hold that the word "tenement" must here be used in its extended meaning, having regard to the use of the words "dwelling house" in the appellants' private Act, or to adopt in this case the particular area or curtilage created into a tenement by the last conveyance or lease of the premises to the respondent.

Having regard to the facts proved in the case, it appeared to the justices that a distinct and appreciable area, beyond that which was reasonable and necessary for the enjoyment of the dwelling-house (having regard to its character and the locality surrounding it), namely, the back or kitchen garden, could be severed, and form by itself a defined unit for the purpose of separate assessment for all rating demands, inasmuch as it was of reasonable size, and capable of being divided and let to another occupier to be used for a building site or for other purposes.

It was also proved to the justices that such a severance of this existing unit of assessment only proportionately lowered the annual value of the house and its grounds, so that the

(1) (1885) 15 Q. B. D. 637. (2) The Parochial Assessments Act, 1836.

annual value of the severed portions plus that of the house and its reduced grounds, amounted to the same sum as that proved to be that of the hitherto undivided unit of assessment.

The justices accordingly held that the annual value of the tenement for the purposes of the sections was 80*l.*

The question for the opinion of the Court was whether the justices were right or wrong in law in holding that they had to make a special assessment only for water purposes for the purpose of a domestic supply, and were therefore entitled to determine what quantity of garden should in their opinion reasonably go with the house, apart from the fact of what was then actually occupied therewith, and further, whether they were right or wrong in excluding the portion of garden above specified from their consideration in determining under the section the annual value of the tenement supplied with water.

If the justices were right in each of their several holdings, the assessment was to stand.

If the appellants' contention was right, that the tenement, the annual value of which was to be determined by the justices, was the whole of the premises occupied by the respondent, the assessment was to be raised to 100*l.*

If the respondent's contention was right, that the tenement, the annual value of which was to be determined by the justices, was the dwelling-house alone, and that the garden ought to be excluded in calculating the annual value of the tenement supplied with water, the case was to be remitted to the justices to deal with, with an expression of the opinion of the Court thereon.

June 19. *Bosanquet, Q.C.* (*Ram* with him), for the appellants. The justices were wrong in holding that any part of the garden could properly be excluded from consideration in determining the annual value of the tenement supplied with water. They ought to have included the whole of the house and curtilage, the annual value of which is found in the case to be 100*l.* It is stated in the case that the whole of the premises was occupied as a residence, and the garden and appurtenances formed part of the curtilage of the house. This

1897

GRAND JUNCTION WATERWORKS COMPANY v. DAVIES.

amounts to a finding that the whole of the premises constitutes one tenement, and the decision of the justices is therefore inconsistent with their own finding. None of the cases which have been decided are directly in point, but the general tendency of the decisions is to shew that the whole of the premises, as occupied by the respondent, ought to be taken into consideration for the purpose of assessment: *Busby* v. *Chesterfield Waterworks and Gaslight Co.* (1); *Lowe* v. *Lambeth Waterworks Co.* (2); *West Middlesex Waterworks Co.* v. *Coleman* (3); *Bristol Waterworks Co.* v. *Uren.* (4)

[WRIGHT J. referred to *Mersey Docks and Harbour Board* v. *Llaneilian Overseers.* (5)]

The assessment ought to be raised to 100*l.*

Shortt (*F. Low* with him), for the respondent. The part of the garden which could be let separately was rightly excluded from consideration. The tenement supplied with water is the house only, and not the garden.

[HAWKINS J. Where is that found in the case?]

It is shewn by s. 48 of the Grand Junction Waterworks Act, 1852, which is part of the case. The question raised here was not decided in *West Middlesex Waterworks Co.* v. *Coleman.* (3) In that case Lord Coleridge C.J. said (6): "Mr. Webster abstained from pressing in the present case the contention that the water-rate ought to be assessed upon the annual value only of so much of the premises as is occupied as a dwelling-house, a contention which, if pressed, might perhaps, where it is applicable, raise a question worthy of consideration." That question now arises for decision. It is a question of fact what quantity of garden should reasonably go with the house, and the justices have found this in favour of the respondent's contention.

[WRIGHT J. What jurisdiction had they to go into that question?]

The whole question is one of degree, and it cannot be that

(1) (1858) E. B. & E. 176; 27 L. J. (M.C.) 174.
(2) (1875) Not reported.
(3) (1885) 14 Q. B. D. 529.
(4) 15 Q. B. D. 637.
(5) (1884) 14 Q. B. D. 770.
(6) 14 Q. B. D. at p. 537.

in every case it is necessary, in assessing the annual value of the tenement supplied with water, to value the whole of the premises as occupied.

Bosanquet, Q.C., replied.

Cur. adv. vult.

July 3. The following written judgment (in which Wright J. concurred) was delivered by

HAWKINS J. This is an appeal against a decision of justices for Middlesex, given in December last, upon an application of the respondent, under s. 68 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17)—which provides that the water rates recoverable from the person requiring, receiving, or using, a supply of water "shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices"—to determine the value of a certain tenement known as No. 1, Grange Road, Ealing, supplied with water by the appellants, and owned and occupied by the respondent, a dispute having arisen as to such annual value between the appellants and the respondent.

The premises known as No. 1, Grange Road consist of a dwelling-house, with a gravelled approach in front and garden at the back, consisting in part of lawn and in part of kitchen-garden, with greenhouse and tool-shed, the whole comprising an area of a little over half an acre, being occupied by the respondent as a residence, and the garden and the other appurtenances form part of the curtilage of the house. The appellants supply the respondent with water for domestic purposes, under s. 46 of the Grand Junction Waterworks Act, 1852, and s. 68 of the Waterworks Clauses Act, 1847, at a rate according to the annual value of the tenement supplied with water, the question, as stated in paragraph 9 of the case, being, what was to be taken into account in determining such annual value.

The appellants contended that the whole area of the premises occupied by the respondent as one undivided tenement ought to be taken into account.

1897

GRAND JUNCTION WATERWORKS COMPANY v. DAVIES.

HAWKINS J.

The respondent contended that the dwelling-house alone ought to be considered, and that the garden ought to be excluded.

After hearing evidence the justices found as a fact that the annual value of the whole was 100*l.*, but that a portion of the garden, though not in any way divided or separated from the rest of the premises, and though occupied as part of the premises, and though desirable for the enjoyment of the premises, might, by making entrances, cutting off a great part of the kitchen-garden, one greenhouse and a portion of another, fowl-houses, a coach- and a bicycle-house, have been separately let, and that in this view the annual value should be, and was, reduced to 80*l.*

In my opinion the justices had no jurisdiction to exclude any such portion of the garden, &c., from their consideration in determining the annual value of the tenement supplied with water. The 68th section of the Act of 1847 confers upon them no authority to curtail the area, or alter the boundaries, of the existing tenement, and to reduce the limits of the garden to that extent which they think should reasonably go with the house, by making alterations never contemplated by the owner or occupier, and which could not be carried out without substantial operations, but contemplates only a mere valuation of the existing tenement, as the owner and occupier up to the present time have chosen to enjoy it. The whole in my opinion forms the residential tenement, and that is the tenement supplied with water.

If the owner and occupier desire to curtail the area, they can do so for themselves, and when (if at all) they have done so, they will be entitled as of right to a valuation of the curtailed area.

The reported cases mentioned to us in the course of the argument do not throw much light on the question immediately before us; still they may be usefully referred to. In *West Middlesex Waterworks Co.* v. *Coleman* (1) the question was, whether, where water was supplied for domestic purposes to a house occupied as a licensed public-house, the licence should be

(1) 14 Q. B. D. 529.

taken into consideration; the company contended that the annual value of the premises as a licensed public-house should be taken as the basis for the water rate, and therefore the fact that the premises were licensed should be taken into consideration, and that the rate should not be based on their value for domestic purposes only, but as they stood, and occupied as they were; and this contention was held to be correct. In *Bristol Waterworks Co.* v. *Uren* (1) A. L. Smith J. intimated the view of himself and Mathew J. to be, that a garden forming part of the amenities of a dwelling-house, and occupied with it, should be treated as added to the house in assessing the value of the house. In this I entirely agree. In the latter case the case of *Lowe* v. *Lambeth Waterworks Co.* (2), decided by Sir George Jessel M.R. in July, 1875, was referred to, but it does not seem to have been reported in any of the regular Reports.

We think therefore the justices were wrong, and the assessment must be raised to 100*l.*

Judgment for the appellants. Leave to appeal refused.

Solicitors for appellants: *Bircham & Co.*
Solicitor for respondent: *H. P. Davies.*

(1) 15 Q. B. D. 637, at p. 649. (2) Not reported.

P. B. H.

C. A.
1897
May 18, 19, 20.

[IN THE COURT OF APPEAL.]

IMRAY *v.* OAKSHETTE.

Landlord and Tenant—Relief of Underlessee after Forfeiture—Breach of Covenant not to Assign—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

The Court has jurisdiction under the Conveyancing and Law of Property Act, 1892, to relieve an underlessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence, and therefore could not be relieved against in favour of the lessee under the Conveyancing and Law of Property Act, 1881, with which the later Act is to be read together. This jurisdiction, however, will be exercised with caution and sparingly, and the underlessee asking for its exercise must shew that he is blameless and has taken all precautions which a reasonably cautious and careful person would use.

Where, therefore, L. purchased an underlease under a contract which did not give him a right to call for the title of the original lessee, who was bound by covenant not to assign or underlet without licence, and he purchased with the intention of laying out a considerable sum upon the property:—

Held, that L. had been guilty of negligence in entering into such a contract that he was precluded from properly investigating the title, and that relief against a forfeiture by the original lessee for breach of the covenant ought not to be granted to him.

THIS was an appeal of the defendant Lyons from an order of Day J. in chambers refusing relief against a forfeiture of a lease.

By indenture dated May 23, 1894, the plaintiffs demised to the defendant Mrs. Oakshette two messuages, Nos. 45 and 47, Walworth Road, and seventeen cottages, for twenty-one years from September 29, 1893, at the yearly rent of 160*l.* The lease contained a covenant by Mrs. Oakshette against assigning or underletting the premises or any part thereof without the consent in writing of the plaintiffs, their heirs or assigns, and a proviso for re-entry on a breach of any of the covenants.

By indenture dated August 3, 1894, Mrs. Oakshette, without licence, demised No. 45, Walworth Road, to Elizabeth Adams

for twenty-one years, less ten days, from September 29, 1893, at the rent of 80*l.*, subject to provisions against assigning or underletting without licence. The rent was reserved to Mrs. Oakshette, her heirs and assigns, but the power of re-entry for breach of covenant was given to her, her executors, administrators and assigns.

By underlease dated October 28, 1895, Mrs. Adams, with the licence of Mrs. Oakshette, demised 45, Walworth Road to Mrs. Muspratt for eighteen and three quarter years, less twelve days, from December 25, 1895, at the rent of 80*l.* This underlease contained a covenant against assigning or underletting without licence from Mrs. Adams, her executors, administrators or assigns.

On April 21, 1896, the defendant Lyons entered into a written contract with Mrs. Muspratt for the purchase at the price of 60*l.* of the interest created by the underlease of October 28, 1895. This contract contained no special conditions as to title. On August 20, 1896, the underlease was assigned to Lyons with the licence of Mrs. Adams. Lyons satisfied himself that licence from Mrs. Oakshette had been obtained for the underlease of October, 1895, but he never saw the lease to Mrs. Oakshette, for the production of which his contract gave him no right to call. He entered into possession and spent about 500*l.* on the house. He deposed that he had throughout been unaware that the plaintiffs had any interest in the property, and that he had considered Mrs. Oakshette to be the superior landlord.

On September 3, 1896, Mrs. Oakshette assigned all her interest in the premises comprised in the lease of May, 1894, to the defendant Hurlock.

On March 12, 1897, the plaintiffs commenced this action against Mrs. Oakshette, Hurlock, Lyons, and Barker, who was alleged to be an underlessee without licence of 47, Walworth Road, to recover possession of the whole property comprised in the lease of 1894, and mesne profits, on the ground that the property had been forfeited by the unlicensed dealings with it.

On April 2, 1897, Lyons took out a summons asking that he might be relieved from the forfeiture so far as it affected

C. A. 1897

IMRAY v. OAKSHETTE.

45, Walworth Road, and that the premises, 45, Walworth Road, might be vested in him for all the residue of the term freed from the covenants contained in the underlease of October 28, 1895, subject, nevertheless, to the rent of 80*l.* and to such other terms and conditions as to the Court might seem fit.

Day J. in chambers refused the application on the ground that he had no jurisdiction, but gave leave to appeal. Lyons appealed.

Buckmaster, for the appellant. Under s. 4 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), the Court has power to grant relief to an underlessee against forfeiture of the lease incurred by the original lessors under any covenant, proviso, or stipulation in a lease, and to make an order vesting the premises in the underlessee for the whole term of the lease upon such conditions as it thinks fit. The words of this section are quite general, and there is nothing to restrict the underlessee's right to relief to forfeitures of any particular kind, or to except from the operation of the section forfeiture incurred for breach of a covenant not to assign.

It is true that by sub-s. 6 of s. 14 of the Conveyancing Act of 1881 (44 & 45 Vict. c. 41) a covenant against assigning is excepted from the operation of the earlier part of the section; but the section merely applies to lessors and lessees, and underlessees are not affected by it: *Wardens, &c., of Cholmeley School, Highgate* v. *Sewell.* (1) There is a reason for the distinction, as, in the case of breach of covenant not to assign, the lessee has himself knowingly committed the breach, while an underlessee may be quite ignorant that any such breach has taken place.

Duke, for the respondent. Sect. 14 of the Act of 1881 constitutes a complete code of provisions as to relief against forfeiture, and by the last sub-section (No. 6) relief against forfeiture is excluded in cases of breach of covenant not to assign. Then by s. 1 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), that Act is to be read together with the Act of 1881. The two Acts must therefore be taken together; and s. 14 of

(1) [1894] 2 Q. B. 906, 911.

the Act of 1881 is incorporated with s. 4 of the Act of 1892; so that neither lessee nor underlessee can get any relief when the forfeiture has been in respect of breach of covenant not to assign without licence. Any other construction would put the underlessee in a better position than the lessee: *Nind* v. *Nineteenth Century Building Society* (1); *Patman* v. *Harland*. (2)

Willes Chitty and *Morten* appeared for Hurlock; but the Court held that he had no locus standi.

Buckmaster, in reply.

[LOPES L.J. You need not address yourself to the question of jurisdiction, but only to whether it ought to be exercised and on what terms.]

Lyons was excusable. The underlease to Mrs. Adams appeared to be a lease from the freeholder, and Lyons believed it to be so.

[RIGBY L.J. That cannot affect the freeholder.]

At all events, it shews that Lyons was acting in good faith, and it will be a great hardship on him to have expended his money on the property and to be deprived of it by no fault of his own. He cannot be considered negligent in entering into an open contract, which is the contract approved by the Act, and he was not negligent in not calling for the lease to Mrs. Oakshette, as he had no power to do so. It is said that the plaintiff objects to an apportionment. Lyons is willing to meet that objection by taking the whole property—a course which is authorized by s. 4. If the landlord doubts the solvency and responsibility of Lyons, Lyons is willing to obtain the guarantee of any guarantee society the plaintiff likes to name. The only other motive that can exist for opposing the application of Lyons is a desire to appropriate his improvements without paying for them.

Cur. adv. vult.

May 20. LOPES L.J. This is a case of some importance, involving the question of the jurisdiction of the Court to grant relief against forfeiture to an underlessee where the breach of covenant is assigning without consent, and the terms upon

(1) [1894] 2 Q. B. 226. (2) (1881) 17 Ch. D. 353.

C. A. 1897

IMRAY v. OAKSHETTE.

Lopes L.J.

which such relief should be granted, if there is jurisdiction to grant it. Lewis Lyons, an underlessee, applied to be relieved from a forfeiture incurred by the original lessee in consequence of a breach of a covenant not to assign without the consent of the superior lessor. That the lessee had forfeited his lease was not disputed, and it was contended by the superior landlord that the Court could grant no relief to an underlessee where the breach of covenant creating the forfeiture was the breach of a covenant not to assign.

The question of jurisdiction depends on the construction to be placed on s. 14 of the Conveyancing Act, 1881, and the 4th section of the Amending Act, 1892. The relief given against forfeiture by s. 14 of the Act of 1881 does not extend (sub-s. 6) "to a covenant or condition against the assigning underletting parting with the possession, or disposing of the land leased." The lessee, therefore, can obtain no relief under that Act in such a case. The case of an underlessee is not provided for by the Act of 1881 at all, and the underlessee, so far as the Act of 1881 is concerned, can obtain no relief. It was, I presume, considered a hardship on the underlessee, when he is not a party to any breach of covenant by the lessee (his lessor), and, if underlessee of a part of the property, when he has done all that his lessor ought to have done, that he should be deprived of his property by reason of a forfeiture incurred by his lessor. Accordingly s. 4 of the Conveyancing Act, 1892, gave power to the Court to protect underlessees on forfeiture by their superior lessees. [The Lord Justice read that section.] Sect. 1 of this Act says that this Act was to be read as one with the Conveyancing Acts, 1881 and 1882. Mr. Duke's contention is that the effect of this is that the exclusion from s. 14 of the Act of 1881 of breach of covenant for assigning without consent is incorporated with s. 4 of the Act of 1892, and that the underlessee in respect of such covenants is in the same position as the lessee—that, in effect, all the Act of 1892 does is to place the underlessee in the same position as the lessee, and that neither can obtain any relief in respect of such covenants. I was at first very much attracted by this argument; but on consideration I do not think that the Acts of Parliament in question can be so

construed when the very general words of s. 4 are carefully regarded. Sect. 14, sub-s. 6, of the Act of 1881 applies to lessees and lessees only. Sect. 4 of the Act of 1892 is dealing with underlessees, different persons with different interests; and unless there are clear words indicating that the same restriction was to be imposed upon them as upon lessees under the earlier Act, I should be unwilling to imply it. Indeed, it seems to me that there are grounds for different treatment. There is a privity between lessor and lessee which does not in ordinary cases exist between lessor and an underlessee; the one would have express notice, while the other might have no notice of the covenant not to assign which he was breaking. If we were to read into the Act of 1881 s. 4 of the Act of 1892, it would be convenient to place s. 4 of the later Act after s. 14 of the former Act, and I do not see how the restriction contained in sub-s. 6 of s. 14 could be carried over to and imported into s. 4 placed as I have suggested. In direct antithesis to the limitation contained in sub-s. 6 of s. 14 we are met by the very general words, "where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease." It was urged by Mr. Duke that in thus construing the Act we were placing the underlessee in a better position than the lessee. This matter is so well dealt with by Charles J. in *Wardens of Cholmeley School* v. *Sewell* (1) that I shall venture to read from his judgment: "I have, therefore, now to ask myself what is the true construction of s. 4 of the Act of 1892; and if the true construction of its actual language is repugnant to any other part of what is practically the same statute, then, applying the principles laid down in *Ebbs* v. *Boulnois* (2), I must give the best interpretation to the Act that I can, and not allow the section in the later Act to induce me to give to it a larger construction than it ought to bear, having regard to the section of the earlier Act. No doubt there is considerable difficulty in the matter, for if the construction contended for by the defendants be the correct one, the Legislature has now said that the underlessee is to have in one sense a better right than the lessee himself,

(1) [1894] 2 Q. B. 906, at p. 911. (2) (1875) L. R. 10 Ch. 479.

C. A. 1897

IMRAY v. OAKSHETTE.

Lopes L.J.

for it has used language which, upon that interpretation of it, is capable of including the case of an underlessee in a set of circumstances in which the lessee himself would be unable to apply for relief. The present case is just one of those cases: Sewell could not apply for relief because, by reason of his bankruptcy, sub-s. 6 operates to exclude him from the benefit of the section, while Messrs. Nicholson are plainly within the language of s. 4 of the Act of 1892. That section does not provide that the underlessee is to have relief in those cases in which the lessee would be entitled to ask for relief under s. 14 of the earlier Act; it is not so framed, but is framed in an unqualified manner, and gives power where the lessor is proceeding to enforce a right of re-entry or forfeiture under any covenant in a lease, upon application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, to make an order vesting the property for the whole term of the lease or any less term in the person claiming as underlessee upon such conditions as approve themselves to the Court. Now, is there any real reason, either in the principle or the history of the matter, why I should restrict the meaning of these very plain words? I can see none. I look at the question as though s. 4 of the Act of 1892 had followed s. 14 in the Act of 1881; and, reading those two sections together, I can see no reason for placing a limited construction on s. 4, while, looking at the history of the matter, I can see many reasons for not doing so. I can imagine many cases in which it would be inequitable to allow a head lessee to apply for relief, but where it would be right to allow a sub-lessee to apply, and I think this case is one of them. It would not be right to allow a lessee who had managed his affairs so badly as to become a bankrupt to apply for relief under any conditions whatever, and it seems perfectly consistent that he should be excluded while the Legislature allows the underlessee to apply for and obtain relief if he is a fit person to have it. I feel a difficulty in varying the plain language of an Act of Parliament in compliance with any supposed scheme which the Legislature may have had in view. I must, it is true, interpret both the sections together; but in doing so I must still give to each

section the full weight which ought to be given to each of the words contained in it. There is no necessary repugnancy or inconsistency between the two sections, and I am not obliged to construe s. 4 in the sense that the underlessee is to be no better off than if he were the lessee. I can perfectly sensibly read the two sections together, and doing so I find that the underlessee may become entitled to a right which the lessee himself could not be entitled to. It is said that this is a very strange result; but the whole of these sections as to giving relief as between landlord and tenant are strange, and would seem very strange to those who lived a century ago. This interference with the contractual rights between landlord and tenant is comparatively modern, certainly with respect to all other covenants than a covenant to pay rent, which stands upon a different footing from a covenant to make a mere money payment. Therefore, although I feel that I am giving these underlessees a right which Sewell himself would not have possessed, still I hold in their favour that I have jurisdiction under s. 4 of the Act of 1892 to give them some relief from the forfeiture which undoubtedly had been incurred." I come therefore to the conclusion that the Court has clearly jurisdiction.

Assuming the jurisdiction, ought relief to be granted to the underlessee in this case? It is a relief which ought to be given with caution and sparingly. It is exceptional. It could not be given to the lessee. It materially affects the interests of lessor and lessee. Before asking for it the underlessee ought to be in a position to prove that he is blameless and exercised all those precautions which a reasonably cautious and careful person would use. Here the underlessee became assignee of a term of twenty-one years less twelve days, with a covenant not to assign without consent, and he was about to spend 500*l.* on the property. This ought to have put him on inquiry: *Patman* v. *Harland*. (1) Mr. Buckmaster admits that the underlessee had constructive notice of a defect in the title. If the underlessee had investigated the title he would have found the restrictive covenant, and then would not have spent

(1) 17 Ch. D. 353.

C. A. 1897

IMRAY v. OAKSHETTE.

his money without obtaining the necessary consent. What has happened arises from the neglect of the underlessee; and in these circumstances I do not think we ought to grant him the relief he asks. The granting this relief is a matter of discretion. The appeal is dismissed.

RIGBY L.J. I am of the same opinion. Two main questions have to be decided. First of all the true construction of the Conveyancing Acts, treating the Act of 1892 as being an Act to be read together with that of 1881. That may be said to be the main question. But upon that I have arrived at a clear conclusion on the lines of the judgment of Charles J. in *Wardens of Cholmeley School* v. *Sewell*. (1) I will say a few words from my own point of view on the different sections. There is no important question of construction raised here for the first time on the Act of 1881. The question is as to the meaning of s. 4 of the Act of 1892 read together with the Act of 1881.

Mr. Duke urged everything that possibly could be said to persuade us that we ought to treat s. 4 simply as a section amending s. 14 of the earlier Act; but I think there was an insurmountable difficulty in the way of the success of that argument. The greater part of the Act of 1892 deals with leases, underleases, and forfeiture, and s. 2, sub-s. 2, is an obvious amendment of s. 14 of the Act of 1881. It is not necessary for the purposes of this case to consider the exact meaning of that sub-section, but it is obviously intended to change the law as between an original lessor and original lessee, and is therefore properly treated as amending s. 14 of the Act of 1881. There is a further amendment which I need not notice, and then we leave, as it seems to me, s. 14 altogether. The Legislature appears to have considered that it had introduced such amendment of s. 14 as was thought necessary, for in s. 3 it goes on to provide against any money being paid for giving a licence to assign. This is going outside and beyond anything that was contained in s. 14, and could not by any reasonable intendment be treated as an amendment of that section.

Then we come to the critical section (s. 4) of the Act of

(1) [1894] 2 Q. B. 906.

1892. It would have been perfectly easy to have included that provision in s. 2 if it had been intended to be an amendment only of s. 14 of the Act of 1881. The fact that it was not introduced there seems to me a strong argument for treating it in point of verbal construction (which is all that I am talking about now) as an independent section, just as s. 3 is an independent section. That is very much confirmed when we find this clause introduced by exactly the same sort of language as that which introduced sub-s. 2 of clause 14: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation," and so on. That looks as if it was a parallel section, and not an amending section; and when we consider the nature of it I think that comes out clearly. There may be cases, no doubt, in which an underlessee ought for all purposes to be considered as in the same position as the original lessee; but there may be cases in which, though there is no jurisdiction to give relief to the original lessee, it would be reasonable to give relief to the underlessee. Thus, for instance, suppose a case possible, though not very probable, where a covenant against assigning without consent was contained in a separate deed, and not referred to in the original lease. As between original lessor and original lessee its being kept separate would not make the slightest difference; but the underlessee would not have constructive notice of it. If he looked at the original lease itself (I am assuming there is no reference in that to the collateral covenant) he would have no notice of the covenant. It would be hard upon the underlessee to treat him as though he were a party to the covenant the existence of which he would not have the chance of ascertaining if he examined the title ever so closely.

I think it reasonable to suppose that in order to provide for cases of that kind the Legislature gave the High Court of Justice the very wide discretion which is contained in s. 4. I come to the conclusion that s. 4 was deliberately intended to be a parallel section, and that the discretion given to the Court involves a power (in very exceptional cases, I agree) to give relief to an underlessee even against forfeiture arising from a breach of a covenant not to assign.

C. A. 1897

IMRAY v. OAKSHETTE.

Rigby L.J.

But how is that discretion to be exercised? Not as though by express language they were told by the Legislature not to take any notice of the previous legislation. On the contrary, I think it is the duty of the Court to consider that legislation most carefully, and to take care that they do not indirectly, by the exercise of a discretion which in terms appears to me to be given to them, do away with that which was a clear intention in the case of the Act of 1881, to withdraw from the Court all discretion as between original lessor and original lessee when the forfeiture arose from breach of a covenant not to assign without consent. Finding that that is a cardinal feature in the Conveyancing Act of 1881, I think we are bound to give the greatest weight and importance to it, though not to the extent, as I have already said, of saying that there is no case in which you can get behind it.

Now, I do not go into the motive of the Legislature for making this difference between breaches of a covenant to assign and breaches of other covenants. It cannot have been the wilful nature of the act, for there are other cases of equally wilful breach of covenant against which the Court has discretion to relieve. Probably it was in a great measure because of the irreparable nature of the act. In other cases you can place the lessor and lessee in precisely the same position in all respects as they were. In the case of a breach of covenant not to assign that cannot be done. If you give relief to the lessee you cannot place the parties in precisely the same position as before, though you may place them in as good a position. At any rate the Acts of Parliament exclude that question as between lessor and lessee. For my part I see great difficulty in imagining any case under s. 4, where it would be right to give relief unless it was founded upon some act or omission of the lessee. I do not lay that down as a rule. I only say I see great difficulty in it. When a wide discretion is given to the Court it certainly ought not to be the business of the Court immediately to begin to lay down rules to regulate it. I do not pretend in any way to lay down any rule: I only try to decide this case upon its merits.

What in this case is the position of the underlessee? He buys according to the form of contract prescribed by the Con-

veyancing Act of 1881. That was a continuance of the policy of the Vendor and Purchaser Act. It only comes to this—Where there is no provision to the contrary, the parties shall be presumed to have bargained on the terms mentioned in the Act. It does not say, and the Legislature never intended, that an underlessee shall not be affected by any defect of title of the original owner. It was only intended to form a model for a contract when the parties did not think fit to depart from it; and in the ordinary case of a lease for occupation purposes the probability is that they would not depart from it. It was intended to remedy a mischief that arose when a man had agreed to take or purchase an underlease, and because he wanted to get off his bargain began to harass the lessor or vendor by requiring him to give information as to title which he could not give. But, as pointed out in *Patman* v. *Harland* (1), that is reasonable where a man is taking a mere occupation lease; but if he is intending to spend money on the premises—for instance, if he is taking a building lease for 1000 years—would it be rational or reasonable in him to adopt that statutory form of contract? The answer is, No; he ought to say, "Notwithstanding that statute I must have a reasonable production of the documents relating to the title."

Now in this case the statutory form of contract was adopted, and the underlessee is in the same position as if he said, "I will not ask about the title," but of course he has constructive notice of everything he would have arrived at if he had acted reasonably and investigated the title in the proper way. A man cannot shut his eyes and then say, "I did not see, and therefore I am not to be bound by notice of such and such a defect." What is the meaning of constructive notice? You have constructive notice when you ought to be treated as though you had express notice. Constructive notice, then, is exactly the same thing as express notice for any purpose we have to deal with. Here is a gentleman proposing to take an underlease and bargaining that he would not investigate the title, although he was going to spend money on the property. I think I might stop there and say that he has no case.

(1) 17 Ch. D. 353.

C. A. 1897

IMRAY v. OAKSHETTE.

Rigby L.J.

Other points have been referred to, one of which I will mention, though it does not form part of the main ground of my opinion. The first thing that this lessee would know of the title would be that Mrs. Oakshette granted a lease for twenty-one years, less ten days, to Adams. Adams underlet to Muspratt, and Muspratt assigned to the present applicant. Every one acquainted with conveyancing knows that the "less ten days" would point strongly to the fact that Mrs. Oakshette, the lessor, was not the freeholder. People do not usually create terms for a number of years, less ten days, unless there be a superior lease. Mr. Buckmaster, who I am bound to say argued the case very clearly, very candidly, and very fairly throughout, pointed out that the rent was reserved to the heirs. That, as far as it went, might be likely to throw off the underlessee from inquiry; but the length of the term pointed in the opposite direction, and a power of re-entry is reserved to the executors and administrators. The conclusion which ought to have been arrived at would be that it was a very carelessly drawn lease, and that not much reliance could be placed upon the precise terms of it. It is, however, unnecessary to consider this matter more carefully, as I think that no representation made by the lessee could bind the lessor, unless the lessor was in some way to blame for allowing it to be made. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Harris & Chetham.*

Solicitors for respondent: *Gush, Phillips, Walters & Williams.*

H. C. J.
W. W. K.

[IN THE COURT OF APPEAL.]

C. A.
1897
May 18.

MACHADO *v.* FONTES.

Jurisdiction—Procedure—Alleged Libel—Publication in a Foreign Country—Action for Damages—Pleading.

An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country.

The rule enunciated in *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, and *The M. Moxham*, (1876) 1 P. D. 107, applied.

APPEAL from Kennedy J. at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the plaintiff in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before Kennedy J. in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.

Montague Lush, for the plaintiff, in support of the appeal. Although it may be that libel cannot in Brazil be made the subject of civil proceedings in which the plaintiff could recover

C. A. 1897

MACHADO v. FONTES.

damages, it is not an innocent act there, and can be made the subject of criminal proceedings. The plea is therefore bad, and should be struck out; for the authorities shew that an action will lie in this country in respect of an act committed abroad if such act is actionable in this country, and not "justifiable" where committed: *Scott* v. *Lord Seymour* (1); *Phillips* v. *Eyre* (2); *The M. Moxham* (3); *The Halley*. (4)

Joseph Walton, Q.C., and *A. J. Ashton*, for the defendant. The plea amounts to this: that the publication of the alleged libel could not be made the subject of an action for damages in Brazil, and the defendant contends that if not actionable there it is not actionable here; and it is no answer to say that if there has been a libel there the State might cause criminal proceedings to be instituted in respect of it. The question as to whether the alleged tort is or is not actionable in Brazil is one of Brazilian law, and the proper course would be to send out a commission to that country for the purpose of inquiring into and ascertaining what the law on the subject is, instead of deciding the question on the materials now before the Court; and if it turns out that the plaintiff individually cannot by any civil proceedings in Brazil make the defendant liable in respect of this alleged libel, no action will lie here, and the plea will be good. There is nothing in the cases cited at variance with this.

[They referred to 1 Smith's Leading Cases, 10th ed. p. 605; notes to *Mostyn* v. *Fabrigas*. (5)]

Montague Lush, in reply.

LOPES L.J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:—]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that

(1) (1862) 1 H. & C. 219.
(2) L. R. 6 Q. B. 1, 28.
(3) 1 P. D. 107.
(4) (1868) L. R. 2 P. C. 193.
(5) (1774) 1 Cowp. 161.

that is not the meaning of the plea: that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word "wrongful" deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips* v. *Eyre* (1) Willes J. lays down very distinctly what the requisites are in order to found such an action. He says this (2): "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham* (3) James L.J., in the course of his judgment, uses these words (4): "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that

(1) L. R. 6 Q. B. 1.
(2) L. R. 6 Q. B. 1, at p. 28.
(3) 1 P. D. 107.
(4) 1 P. D. 107, at p. 111.

C. A. 1897

MACHADO v. FONTES.

Lopes L.J.

the action lies, for it complies with both of the requirements which are laid down by Willes J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY L.J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes J., in *Phillips* v. *Eyre* (1), was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate.

(1) L. R. 6 Q. B. 1.

The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes J. in *Phillips* v. *Eyre* (1); and in the case of *The M. Moxham* (2) all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published. James L.J. states in *The M. Moxham* (2) what the settled law is. Mellish L.J. is quite as clear upon that point as James L.J. in laying down the general rule; and Baggallay L.J. also takes the same view. We start, then, from this: that the act in question is primâ facie actionable here, and the only thing we have to do is to see whether there is any peremptory bar to

(1) L. R. 6 Q. B. 1. (2) 1 P. D. 107.

C. A. 1897

MACHADO v. FONTES.

Rigby L.J.

our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

Appeal allowed.

Solicitors: *Grant, Bulcraig & Co., for Parker, Eyre & Moorhouse, Manchester; Chester & Co., for Crofton, Craven & Worthington, Manchester.*

W. W. K.

C. A. 1897 *May* 24.

[IN THE COURT OF APPEAL.]

FORTESCUE *v.* MERCANTILE BANK OF LONDON, LIMITED.

Solicitor—Bill of Costs—Sale of Property subject to Incumbrances—Sale by Second Mortgagee with Power of Sale—Costs of Vendor's Solicitor—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I., r.* 9.

Rule 9 of Sched. I. of the General Order to the Solicitors' Remuneration Act, 1881, which provides that "where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money," applies to the case of a sale by a second mortgagee under his power of sale.

APPEAL from an order of a judge refusing to direct a review of taxation of a bill of costs.

The owner of a rent-charge mortgaged it to secure a sum of 3800*l.*, and executed a second mortgage to the defendants to secure 100*l.* advanced by them. The defendants had a power of sale, which they exercised, and sold the rent-charge subject to the first mortgage for a sum of 185*l.* The solicitor who conducted the sale for the defendants, in making out his bill of costs, treated the aggregate of the two sums of 3800*l.* and 185*l.* as the amount of the purchase-money on which the scale fees for negotiating sale and for deducing title and completing the conveyance should be calculated.

This action was brought by the plaintiff as assignee of the mortgagor of the rent-charge to recover from the defendants the balance of the purchase-money over and above their debt and costs, and the defendants claimed to charge the amount of the solicitor's costs arrived at on the footing above mentioned against the balance of the 185*l.*, after deducting their debt and interest. The plaintiff thereupon obtained an order for the taxation of the bill of costs, and upon such taxation the master allowed the scale fees on the actual purchase-money (185*l.*) only, on the ground that rule 9 of Sched. I. of the Orders under the Solicitors' Remuneration Act, 1881, was not applicable to the case before him of a sale by a second mortgagee.

Rule 9 is as follows: "Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption." The defendants carried in objections to the taxation on the ground that the master was wrong in excluding from the operation of the rule the case of a sale by a second mortgagee of property subject to incumbrances.

On appeal Bruce J. disallowed the objections.

The defendants appealed.

Cozens-Hardy, *Q.C.*, and *Ashton Cross*, for the defendants. The case comes within the words of the rule, and there is no reason for excluding it from the operation of the rule.

[They cited *In re Grey's Brewery Co.* (1); *In re Gallard, Ex parte Harris.* (2)]

English Harrison, contra. The language of the rule must be limited to prevent its leading to unjust conclusions where the actual amount of the purchase-money is small compared with the incumbrances. This is not the case of the transfer of the whole property, and the exception in the rule strengthens the view that it was not intended to apply to a sale by a second mortgagee.

(1) (1887) 56 L. T. 298.

(2) (1888) 21 Q. B. D. 38.

C. A. 1897

FORTESCUE v. MERCANTILE BANK OF LONDON.

LORD ESHER M.R. We have to apply rule 9 to the circumstances of this case, and to do that we must construe the rule. Unless there is something which necessitates the rule being construed in some other way it must be taken according to the ordinary meaning of the words. The rule says that, where property is sold subject to incumbrances, the amount of the incumbrances is to be deemed part of the purchase-money—that is, it is to be so treated for the purpose of a claim by the solicitor for his costs. It is suggested that taking these words as they stand without limitation would produce a state of things that could not have been intended, because in this case the purchaser only gave 185*l.*, but the costs would be calculated on a sum of 3985*l.* If the real state of things is considered it will be seen that the purchaser does not get the property for the smaller amount, for he is under a liability to pay the amount secured by the first mortgage. Then, what has the solicitor done? He has conducted a purchase, not at the smaller sum, but for that and the amount of the incumbrances together, and in that view of the case the charge calculated on the aggregate sum is not unreasonable. The argument that the plain words of the rule must be departed from fails, and the rule applies to the case. Under these circumstances the appeal must be allowed.

A. L. SMITH L.J. The question raised is upon what scale the costs of the solicitor on a sale conducted by a second mortgagee under a power of sale are to be calculated. Rule 9 apparently is plain enough. It deals with the scale of costs when a property is sold subject to incumbrances. That is exactly applicable to this case, which is a sale of the property subject to the first mortgage.

CHITTY L.J. I am of the same opinion. This is a sale by a second mortgagee exercising a power of sale, and the property has been sold subject to the first mortgage. The case comes within the words of rule 9, and, looking to the fact that the purchaser's liability is not limited to the sum he paid, but includes the liability to pay the amount of the first mortgage, I

can see nothing unreasonable in the application of the rule to this case, or any ground for cutting down the plain meaning of the words of the rule.

Appeal allowed.

Solicitor for plaintiff: *Thomas Charles.*
Solicitor for defendants: *G. B. W. Digby.*

A. M.

LLEWELLYN *v.* VALE OF GLAMORGAN RAILWAY COMPANY.

1897
May 31;
July 3.

Railway—Penalty for not substituting Road for Road interfered with—Road belonging to Different Owners—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By s. 54 of the Railways Clauses Act, 1845, a railway company who neglect to substitute a sufficient road for any road obstructed by them in the exercise of their powers are liable to a penalty, which in the case of a private road is to be paid "to the owner thereof":—

Held, that the section is applicable to a case in which part of the width of the obstructed road is owned by one person and part by another.

Semble, that the company are liable for the entire penalty to every person who owns any part of the obstructed road.

TRIAL before Wright J. without a jury.

The plaintiff was the owner of certain fields near Bridgend, in the county of Glamorgan, which fields adjoined an old occupation road. The road was not repairable by the inhabitants at large, and had for many years been used by the owners of the lands adjoining it, including the plaintiff. The defendants were, by a special Act incorporating the Railways Clauses Act, 1845, authorized to make a railway crossing the road at the point at which it adjoined the plaintiff's land. On May 9, 1896, the defendants commenced to cut through the road, and rendered it impassable by the plaintiff and other persons entitled to the use of it. The defendants did not prior to cutting through the road cause any road to be made in substitution for the road so interfered with, as they were bound to do under the provisions of s. 53 (1) of the Railways Clauses Act, 1845,

(1) By s. 53 of the Railways Clauses Act, 1845, "If in the exercise of the powers by this or the special Act granted it be found necessary to cross

1897

LLEWELLYN v. VALE OF GLAMORGAN RAILWAY.

and the road continued to be impassable until August 3, 1896, by which date the defendants had erected a temporary bridge over the portions of the road so cut through. The plaintiffs brought an action under s. 54 of the said Act to recover 1700*l.*, being eighty-five days' penalties from May 9 to August 3. By a compromise between the parties it was agreed that if the plaintiff was entitled to recover any penalties at all the amount so recoverable by him should be 150*l.*

C. A. Russell, Q.C., and *E. Buckley*, for the plaintiff. The fact that the plaintiff only owns part of the road is immaterial. Every person who owns any part of the road interfered with may sue for the whole penalty. At all events, one part-owner may recover as trustee for all the parties interested.

Cripps, Q.C., and *Kenyon Parker*, for the defendants. The word "owner" in s. 54 means the owner of the road throughout the whole length and breadth interfered with. If the road belongs in parts to different owners the section has no application.

Russell, Q.C., in reply.

Cur. adv. vult.

July 3. WRIGHT J. The plaintiff is the owner of land situated in a rural district and bounded on one side by a road which is not a public highway, but which is used by the owners of the lands on either side of the road. There is nothing to shew to whom the soil of the road belongs, and it appears to me

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cut through raise sink or use any part of any road . . . . either public or private so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages or to the persons entitled to the use thereof, the company shall before the commencement of any such operations cause a sufficient road to be made instead of the road to be interfered with."

By s. 54, "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid they shall forfeit 20*l.* for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and . . . . in case of a private road the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior courts."

that the ordinary presumption of ownership ad medium filum is applicable. The plaintiff, therefore, is owner of one-half of the road by the side of this land, and he has a private right of way along the other half. The defendants, in constructing their railway, temporarily interfered with and obstructed the road without providing a substituted way. They have, therefore, contravened s. 53 of the Act, and they have primâ facie incurred the penalty imposed by s. 54, and the only question is whether the plaintiff is entitled to recover the penalty, or any and what part of it. The matter is complicated by the fact that the owner of the other half of the road is not a party to the action, and has neither made nor waived any claim against the defendants.

It is argued for the defendants that the statute imposes a single penalty in respect of the whole width of the road, and that the language of s. 54 is not applicable to a case in which the whole width of the road is not owned by one person. It is pointed out that there is no machinery for apportionment, and that if the owner of each half has a right of action and sues separately, either the company must be liable to two whole penalties, or there must in each action be an apportionment at the instance of one owner without the presence of the other.

If, however, the plaintiff can recover anything, I am in this case relieved from the difficulty of ascertaining the quantum, because the parties have agreed that, if he is entitled to recover anything, he is to have 150*l*. In my opinion, he is entitled to recover something in respect of his own half of the road. Suppose the defendants had obstructed that half only. In that case it seems to me that they would have been liable to the plaintiff for the whole penalty, because they would have made the road useless to the plaintiff. If so, the plaintiff cannot lose his right merely because some one else has been wronged.

I am inclined to think that the company are liable for the whole penalty to every person who owns any part of the obstructed road. This must apparently be so if the road is regarded longitudinally. Suppose the company break up or stop up a mile of road, each hundred yards of which is owned by a different person. I cannot think that they would incur

1897

LLEWELLYN v. VALE OF GLAMORGAN RAILWAY.

only a single penalty for the benefit of one owner or no penalty at all. There will be judgment for the plaintiff for 150*l*.

Judgment for the plaintiff.

Solicitors for plaintiff: *Soames, Edwards & Jones.*
Solicitors for defendants: *Downing, Holman & Co.*

J. F. C.

C. A.
1897
June 16, 17;
July 5.

[IN THE COURT OF APPEAL.]

POWELL *v.* KEMPTON PARK RACECOURSE COMPANY.

Gaming—Place used for Betting—Inclosure on Racecourse—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The "place" contemplated by the Betting Act, 1853, ss. 1, 3, is a place which is analogous in its character and use to a betting house or office.

Adjacent to a racecourse there was an uncovered inclosure of about a quarter of an acre in extent, fenced in by iron rails, to which, when race-meetings were held, the public were admitted by the proprietors of the racecourse on payment of an entrance fee. The number of persons admitted to this inclosure on race-days varied from 500 to 2000, and among them were always a number of professional bookmakers, varying from 100 to 200, who were admitted on the same terms as the general public, and had no interest in or control over the inclosure, or any part thereof, nor any special rights therein. The greater number of the other members of the public who frequented the inclosure went there for the purpose of backing horses with the bookmakers; but a certain number did not bet at all. With a few exceptions the bets made by the bookmakers in the inclosure related to the particular race then about to be run. The bookmakers sometimes required the backer to deposit his stake and sometimes betted on credit. The bookmakers frequenting the inclosure were accompanied by their clerks, who assisted them in their transactions. They did not confine themselves to any fixed spot in the inclosure, nor did they use any apparatus such as a desk, stool, umbrella, or tent, though any particular bookmaker was usually to be found in or near the same part of the inclosure. No betting-lists were exhibited in the inclosure. The practice of the bookmakers was to call out the odds for the purpose of attracting the attention of backers. The businesses of the different bookmakers were rival and competing. It appeared that at the time of the passing of the Betting Act, 1853, such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same

character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the century :—

Held (by Lord Esher M.R., Lindley L.J., Lopes L.J., A. L. Smith L.J., and Chitty L.J., Rigby L.J. dissenting), that such an inclosure used in such a manner as above mentioned did not come within the provisions of the Betting Act, 1853, ss. 1, 3.

Hawke v. *Dunn*, [1897] 1 Q. B. 579, disapproved of.

APPEAL from the judgment of the Lord Chief Justice in an action tried before him without a jury.

The plaintiff was a shareholder in the defendant company, which was incorporated under the Companies Acts for the purpose of carrying on, and did carry on, the business of a race-course company, and from time to time held and conducted race-meetings under the provisions of its memorandum of association.

The statement of claim alleged that the defendants had for the purposes of their business acquired and were the owners and occupiers of lands and premises known as Kempton Park Racecourse, containing a considerable number of acres, and inclosed by a substantial fence; that adjoining the course, and forming part of the said land and premises, the defendants had fenced off and inclosed by means of iron rails a certain piece of ground or inclosure known as the Reserved Inclosure; and that any member of the public was admitted by the defendants to the racecourse on payment of an entrance fee of 1*s.* on ordinary occasions, and 2*s.* 6*d.* on special occasions, and to the said inclosure on payment of a further fee of the difference between the entrance fee paid and 1*l.* It was further alleged that at race-meetings the said inclosure was opened and kept by the defendants for the purpose of (1.) certain persons using the same, that is to say, professional bookmakers, betting with persons resorting thereto, and (2.) money being received by or on behalf of such persons using the same as deposits on bets made on horse-races then being held on the said land and premises under the direction and control of the defendants; and that at all race-meetings the said inclosure was extensively used by professional bookmakers for the purposes aforesaid, and the defendants knowingly and wilfully permitted the said inclosure to be so used; and that by reason of the matters

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

aforesaid the defendant company was carrying on a business that was illegal under the Betting Act, 1853, and outside the scope of its memorandum of association, and was liable to be indicted and fined, and to have its property sequestrated. The plaintiff claimed an injunction to restrain the defendants from opening or keeping the said inclosure for the purpose of persons using the same in the manner above described, and from permitting the same to be so used.

The statement of defence stated in the 1st paragraph that the Reserved Inclosure referred to in the statement of claim did not exceed a quarter of an acre in extent, and was an uncovered inclosure, except that on the far side of it from the racecourse there were raised tiers of seats covered over with a roof, which erection formed part of a building known as the Grand Stand, that adjoined this and other inclosures adjacent to the racecourse, and submitted that the said inclosure was not a "place" within the meaning of the Betting Act, 1853. In the 2nd paragraph the defendants denied that they opened and kept the said inclosure for the purposes alleged in the statement of claim, and that they knowingly and wilfully permitted it to be used for those purposes. The 3rd paragraph stated that the bookmakers referred to in the statement of claim frequented the inclosure on such terms and conditions, and under such circumstances, that they were not "persons using the same," but "persons resorting thereto" within the meaning of the Betting Act, 1853. The 4th paragraph stated that a considerable amount of betting was carried on by bookmakers in the said inclosure during race-meetings, but in such a manner and under such circumstances that they did not use it for either of the illegal purposes mentioned in the statement of claim; and that at the time of the passing of the Betting Act, 1853, betting of the same character and description had for many years previously been habitually and notoriously carried on in racecourse inclosures, and had since been so carried on until recently without the intervention of the authorities.

Particulars were delivered under the order of a master of the terms and conditions, and circumstances, in and under which bookmakers frequented the inclosure as stated in paragraph 3

of the defence, and of the manner and circumstances in and under which betting was carried on by them therein as alleged in paragraph 4. The particulars were as follows :—

1. The said inclosure is kept by the defendant company for the purpose of the public being admitted thereto to see the races at meetings held under the management of the defendant company on their said premises, and the public are on such occasions admitted thereto subject to the payments specified in the statement of claim. Each person on making the required payment receives a ticket with the words "Reserved Inclosure" printed thereon. Such ticket entitles the person receiving the same to resort to and frequent the said inclosure till the close of the racing on the day of issue and not further or otherwise, but any such person is liable to be ejected from the said inclosure by the defendant company's servants for improper or illegal conduct. Any person passing out of the inclosure may be readmitted on the same day provided that he before leaving obtains a readmission ticket and presents the same on readmission, but not otherwise.

2. The number of persons admitted to the said inclosure on race-days varies from 500 to 2000, and among such persons there are always a certain number, varying from 100 to 200, who are professional bookmakers carrying on their business in manner hereinafter described. The bookmakers are admitted to the inclosure as members of the general public and not otherwise, and on the same terms as to payment, readmission and in all other respects, nor do they in fact frequent or claim to frequent the inclosure except on such terms. They are not persons having any rights, interest, or control in or over the inclosure or other premises the property of the defendant company, nor have they any special rights or privileges therein. Of the other members of the public frequenting the said inclosure, the greater number go there for the purpose of "backing" horses with the bookmakers, but a certain number do not bet at all.

3. The bookmaker in the inclosure invariably carries on the practice of betting as hereinafter described. He is accompanied by a clerk, who sometimes is in partnership with him,

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

and who assists him in his transactions. He does not confine himself to any fixed spot in the inclosure, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the inclosure. No betting-lists are exhibited. On the other hand, the backers are persons who back particular horses with the bookmakers as hereinafter more particularly mentioned.

4. With a few exceptions when betting takes place on future events, betting in the inclosures is confined to betting on the races of the day, and no betting commences on any individual race before the names of the horses which are going to run in that race are announced on the telegraph board: usually about a quarter of a hour before the time appointed for that race to be run. Such betting is known as "post betting," and continues in most cases till the fall of the flag, when the horses start, and bets are frequently made while the race is being run. "Post betting" is always done at stated prices or odds—that is to say, it may be at stated odds on "the field" (as hereinafter explained) against the horse backed, or at odds on the horse against "the field," or at evens. These prices vary from time to time, as a greater or less extent of money may be forthcoming to back a particular horse or horses. "Post betting," as would appear from the above statement, is not carried on in respect of more than one race at a time. It is confined to the particular race next about to be run, or then being run: consequently, as hereinbefore stated, no betting-lists are ever exhibited or are required for the purposes of the business.

5. The difference in the method of betting adopted by the bookmaker from that adopted by the other members of the general public, who are generally the backers, is as follows: The backer for each bet selects as a rule one horse which he desires to back against the other horses engaged in the race, which horses in each case as regards the particular horse backed are then called "the field," and he applies to the bookmaker to name the price or odds at which he will back "the field" against such horse. A backer will also at times, where any horse is at the opening of the betting quoted at long odds, back

that horse with a view of laying against such horse should it subsequently be quoted at shorter odds as hereinafter mentioned. On the other hand, the practice of the bookmaker is to back "the field" against each and every horse in the race as far as possible, and to such an extent and amount that in the result whichever horse wins the total amount he will according to his book be entitled to receive from the backers of the horses that are beaten will be in excess of what he may have to pay the backers of the horse that wins, the difference being the profit on his book. While, therefore, it is the object of the bookmaker to back "the field" against as many horses as possible, he must to avoid loss abstain from backing "the field" against any one horse to more than a certain amount—the limit being that his liability in respect of any one horse must be less than what he will be entitled to receive in respect of the other horses.

6. On application by an intending backer of any particular horse the bookmaker states the price or odds at which he is willing to back "the field" against such horse. If the bet is made it is entered by the bookmaker's clerk in a book; and in some cases the backer is called upon to deposit his stake with the bookmaker, as is hereinafter more particularly explained. When a bookmaker is anxious or willing to back "the field" against a particular horse, he calls out the odds which he will give or take in respect of such horse, and frequently the odds are so called out many times without a response being received. By so offering to give or take such odds the bookmaker does not offer to make any bet an indefinite or any number of times, nor does he bind himself to bet with any person who may wish to bet with him, and accept the odds so offered. In all cases where there are several horses engaged in the race there are some against which the bookmaker is anxious to back "the field"; consequently this practice of calling out odds is largely adopted by every bookmaker betting in the inclosure for the purpose of attracting the attention of backers.

7. Backing horses against "the field" is not confined to the backer; nor is backing "the field" against particular horses confined to the bookmaker. When a bookmaker has backed "the field" against a particular horse up to his limit (as herein-

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

before stated and explained) he will usually refuse to back "the field" against that horse further. A bookmaker will frequently back horses under the following circumstances: (1.) if he has exceeded his limit; (2.) if he has laid short odds on "the field" against a horse which subsequently goes to a longer price; (3.) if he has special information that a horse is likely to win. Conversely, if a backer has backed a horse at long odds, whether before the meeting or in the inclosure, and the horse goes to a shorter price, he frequently endeavours to back "the field" against the horse at such shorter price, and if necessary calls out the odds at which he will so back "the field" in the same manner as is hereinbefore described in the case of the bookmaker.

8. The number of bets made by a bookmaker on each race under the circumstances hereinbefore described is greatly in excess of that made by a backer, even though the latter may be systematically backing horses, and one bookmaker makes bets on each race with numerous backers. The businesses of the various bookmakers are rival and competing; and the business of each bookmaker is independent both of that of every other bookmaker and also of the defendant company, as owner of the inclosure. No one bookmaker does or could bet in the manner and under the circumstances hereinbefore described with all persons who resort to the said inclosure, or with more than a small fraction of such persons. The defendant company have no knowledge of what persons do and what persons do not act as bookmakers in the said inclosure. No person in the inclosure is admitted with, or has any greater or any less right to act as a bookmaker than any other person, although, in fact and practice, the limited number of persons who do act in that capacity collectively form the market for such bets as the rest of the public or the backers wish to make.

9. Some bookmakers carry on a ready-money business in the inclosure—that is, they usually require the backer to deposit his stake in respect of the bet at the time the bet is made. The bet is then entered in the book, and the backer receives a ticket corresponding with the entry so made. Others do the greater part of their business on credit—that is to say, no

money is deposited on either side, but they only do business in this way with persons whom they know to be of good credit. Should any person who was unknown to them offer to bet with them, they would either decline to bet or require such person to deposit his stake. Saving as aforesaid, no money is deposited in respect of bets made or to be made in the inclosure.

10. The foregoing particulars contain a full and accurate account and description of the betting which is carried on not only in the inclosure forming part of the defendant company's premises, but in all racecourse inclosures in which betting takes place. At the time of the passing of the Betting House Act, such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century. Ever since the passing of the said Act up to the present time, bookmakers have openly and habitually continued to carry on a similar kind of betting in such inclosures, and until recently without any suggestion of its being illegal.

It was admitted at the trial by both parties that the inclosure in question was such as was described in the pleadings, and that the particulars correctly stated the facts with regard to the use made of it, and by the defendants that they knew that such use was made of it at race-meetings.

The Lord Chief Justice, upon the authority of *Hawke* v. *Dunn* (1), gave judgment for the plaintiff, and granted an injunction as prayed.

June 16, 17. *Sir F. Lockwood, Q.C.*, and *Joseph Walton, Q.C.* (*C. W. Mathews* and *Stutfield* with them), for the defendants. Two questions arise on this appeal: first, whether the Reserved Inclosure is a "place" within the meaning of the Betting Act, 1853; and, secondly, whether it is used in a manner prohibited by the Act.

The word "place" as used in the Act is an ambiguous expression, and cannot possibly be construed in its most extensive sense, for, if it were so construed, inasmuch as a man who

(1) [1897] 1 Q. B. 579.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

bets must bet somewhere, the Act would have the effect of making all betting illegal, which is obviously beyond its scope. The preamble of the Act, to which it is permissible to have recourse in order to define the scope of an ambiguous expression in the enacting part of the Act, shews that the object was to suppress betting houses and offices—that is to say, places used by persons making a business of betting as their places of business for the purpose of carrying on the business of betting with persons resorting thereto. The preamble recites that "a kind of gaming has of late sprung up," and it is obviously at that kind of gaming that the Act is aimed. That kind of gaming is described in *Reg.* v. *Cook*. (1) The use of inclosures as the inclosure in this case was used had not of late sprung up when the Act was passed, but had existed from as far back as the beginning of the century. The word "place" in the enacting portion of the Act must be construed as meaning something ejusdem generis with the things described by the preceding words, "house, office, room," and, in order that a case may come within the Act, such a place must be opened, kept, or used by some one for the same purposes as a betting house or office—that is to say, as his place of business for the purpose of carrying on his business as a professional betting-man with persons resorting thereto. Under s. 2 a place within the Act is declared to be a common gaming-house within 8 & 9 Vict. c. 109; and, if the plaintiff's contention is right, all persons found in the inclosure may be seized and taken before a magistrate. The Act clearly contemplates by "place" something which like a house, room, or office is capable of being occupied or controlled by a person keeping or using it for the business of betting. In the present case the bookmakers within the inclosure use no sort of structure, and have no fixed or ascertained spot upon which they carry on business. They are admitted on the same terms as any other members of the public, and have no right or privilege in respect of any part of the inclosure other than that which members of the general public admitted to it have. It has been held or assumed in many cases that to constitute a "place" within the Act, there

(1) (1884) 13 Q. B. D. 377.

must be a spot fixed and ascertained by some structure: see *Shaw* v. *Morley* (1); *Bows* v. *Fenwick* (2); *Gallaway* v. *Maries*. (3) It may be that, if a particular portion of an inclosure is so appropriated by a bookmaker, that would be within the Act, but that is not the present case.

[They also cited *Reg.* v. *Portugal* (4); *Thwaites* v. *Coulthwaite*. (5)]

Asquith, Q.C., and *H. S. Cautley*, for the plaintiff. The preamble to the Betting Act, 1853, was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1; but that repeal is not to affect the construction of the Act. It may be admitted that the kind of mischief mainly aimed at by the Legislature was that which is described in *Reg.* v. *Cook*. (6) But, as frequently happens, the Legislature seems to have thought that, in order to deal effectively with that mischief, it was necessary to go somewhat further for the purpose of preventing evasion of the Act, and therefore in the enacting clauses they went beyond the scope of the preamble. So in the enacting clauses they specify, in addition to "houses" and "offices" mentioned in the preamble, "rooms" and "places"; they also deal not only with the persons owning, or occupying, but also with persons using such places for the purposes prohibited. The preamble only refers to betting upon deposit, whereas the enacting clauses refer to places used for any kind of betting with persons resorting thereto. The Act distinguishes between the two classes of persons, namely, the persons who use such places, and the persons who merely resort thereto; and the offence under the Act is the use of a house, room, office, or other place by a person making a business of betting for the purposes of such business by betting with persons who resort thereto, or the permission of such use knowingly and wilfully by the owner or occupier of the house, room, office, or place. It may be admitted that some limitation must be placed on the interpretation to be given to the word "place" as used in the Act, because in the widest sense of the term Salisbury Plain, or

(1) (1868) L. R. 3 Ex. 137.
(2) (1874) L. R. 9 C. P. 339.
(3) (1881) 8 Q. B. D. 275.
(4) (1885) 16 Q. B. D. 487.
(5) [1896] 1 Ch. 496.
(6) 13 Q. B. D. 377.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

indeed the whole of the country, may be said to be a place. It is suggested that the only proper limitation must be found by looking to the language used in connection with the nature of the mischief aimed at. It is clear, having regard to the language, that a "place" to be within the Act must be one which is capable of being occupied, and being kept, and of being used by a person for the purpose of betting with persons resorting thereto as a business. It must be a place so far fixed and ascertained as to be one where the person carrying on the business of betting can be readily found, and which is capable of being resorted to by persons wishing to make bets with him with the reasonable certainty of finding him. It is submitted that, if these conditions are satisfied, the case is within the Act. It is impossible to define "place" otherwise than by reference to the purposes of the statute, and the mischief aimed at. The mischief aimed at being the user of places for the purposes of carrying on betting as a business, if a place is capable of being so used it is a "place" within the meaning of the Act. It cannot be necessary that it should be roofed over, or that there should be any particular kind of structure. It is submitted that the facts stated in the particulars shew that the Reserved Inclosure is such a place. Each of the bookmakers admitted thereto uses it for the purpose prohibited by the statute, namely, that of carrying on the business of betting with persons resorting thereto; and the defendants knowingly allowed them so to use it. It is not necessary that there should be an exclusive user or occupation of any particular spot in the inclosure by the bookmaker in order to bring the case within the Act. A merchant uses the Royal Exchange for the purposes of his business, though he does not occupy or use any particular defined part of it. The decisions on the subject do not support the proposition that a "place" must be a structure ejusdem generis with a house, office, or room: *Doggett* v. *Catterns* (1); *Eastwood* v. *Miller* (2); *Haigh* v. *Sheffield Town Council.* (3)

(1) (1864) 17 C. B. (N.S.) 669; (1865) 19 C. B. (N.S.) 765.

(2) (1874) L. R. 9 Q. B. 440.

(3) (1874) L. R. 10 Q. B. 102.

[They also cited *Hornsby* v. *Raggett* (1); *Liddell* v. *Lofthouse* (2); *Snow* v. *Hill* (3); *Reg.* v. *Preedy*. (4)]

Joseph Walton, Q.C., in reply, cited *Henretty* v. *Hart*. (5)

Cur. adv. vult.

July 5. The following written judgments were read:—

LORD ESHER M.R. This is an appeal from a pro formâ decision of the Lord Chief Justice in a case tried before him without a jury. The action was brought against the Kempton Park Racecourse Company by an alleged shareholder in it asking for an injunction against the company to forbid them from continuing "knowingly and wilfully to permit certain persons to use a certain inclosure belonging to the company illegally within the meaning of the statute 16 & 17 Vict. c. 119." The facts are to be collected from admissions made in writing and verbally at the trial before the Lord Chief Justice, and in certain particulars given between the parties before the trial and used as evidence at the trial and treated as true in fact and undisputed. As to these particulars, Mr. Asquith, who argued the plaintiff's case as well and earnestly as it could be, said, in opening the case before the Lord Chief Justice: "I am instructed that, after a careful investigation, the facts stated in the particulars may be assumed to be correctly stated." It has been suggested to us that the facts stated in the tenth particular as to the former usage on racecourses are not correct. I think it is impossible for the Court of Appeal properly to adopt any such suggestion, and I venture to say that I am convinced that the statement is absolutely correct. From the sources I have named the facts of the case were ascertained to be as follows: The company are the owners of the Kempton Park Racecourse and of certain stands and inclosures on the racecourse. There are several stands, and each stand has an inclosure in front of it open to the stand but railed off from the rest of the racecourse by iron railings. One of these inclosures

(1) [1892] 1 Q. B. 20.
(2) [1896] 1 Q. B. 295.
(3) (1885) 14 Q. B. D. 588.
(4) (1888) 17 Cox, 433.
(5) (1885) 13 Rettie, Court of Justiciary Cases, 4th Series, 9.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lord Esher M.R.

is known as the Reserved Inclosure. Admission is given to that inclosure and its stand to any one who applies and makes a payment of 1*l.* for and in respect of such admission. Every person so admitted is entitled to walk and stand in the inclosure and in every part of it and to sit in the stand. No part of the inclosure or stand can be or is reserved by any one for his own use when not actually there. Many persons pay for admission to such inclosure and stand upon such terms, and amongst them are many professional betting-men called bookmakers, who pay the same amount as others for their admission and who are admitted on the same terms as the others. The bookmakers when in the inclosure shout out the odds they are prepared to bet against each and every horse in a race, and for a certain time they bet such odds with every one who desires to bet and who is ready, if required, to deposit with the bookmaker the amount which he bets against the bookmaker, so that the bookmaker, in case the horse against which he bets does not win, keeps the money he took on deposit, but, if the horse does win, he undertakes to pay the odds he bet against the horse. The bookmaker goes to the races and into the inclosure for the purpose of betting in the way described with every one who will bet with him. The bookmaker bets as a matter of business. To bet in the way described is his business. The businesses of the various bookmakers are as against each other rival and competing, and the business of each bookmaker is independent of that of every other bookmaker. No one of them assumes to exercise or does exercise any manner of exclusive user of any part of the inclosure, but walks or stands in the inclosure and every part of it in the same manner and on the same terms as every other person in the inclosure. The description above given of the betting carried on at Kempton races is a full and accurate account and description of the betting which is carried on not only at Kempton races in the Reserved Inclosure, but in all racecourse inclosures in which betting takes place. At the time of the passing of the Betting Act, 1853, such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by

them, and had been so carried on since the beginning of the present century.

It is upon these facts that the plaintiff on the record asks for the injunction he claims against the defendants. He insists that upon these facts the judge who tried the case ought to have found that the company, the owners of the inclosure, did knowingly and wilfully permit the inclosure to be used by persons other than the company—namely, the bookmakers—in a manner made illegal by the statute 16 & 17 Vict. c. 119. It is impossible to say that the company opened, kept, or used the inclosure for the purpose of the company betting with persons resorting thereto. It is impossible to say that the bookmakers or any bookmaker opened or kept the inclosure at all. The question must be whether the bookmakers or some or one of them was or were permitted to use and did use the inclosure illegally within the meaning of and therefore contrary to the statute. This proposition raises three questions: First, is such an inclosure such a place as can come within the meaning of the statute? Secondly, if yea, was the inclosure so used by anybody as to make the inclosure or any part of it a place illegally used within the meaning of the statute? Thirdly, if it was used illegally, was such use knowingly and wilfully permitted by the company? If all these three propositions are to be answered against the company, the injunction ought to be granted. If any one of them is answered in favour of the company, the injunction ought not to be granted.

In this case it is clear that the company must have known what was habitually done in the inclosure. If then what was done was illegal, the third proposition must be answered against the company. If what was done was not illegal, the third proposition must be answered in favour of the company. They cannot be said to have permitted what did not exist. This reduces the discussion to the first and second propositions. In order to determine the first and second propositions and their importance, it is necessary in the first place to determine what is the true construction of the statute.

In order to construe the statute the Court is bound to consider the condition of the things existing immediately before and at

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lord Esher M.R.

the time of the passing of the statute which are dealt with by the statute. The Court is bound in this case to consider, amongst other things, the things stated in the tenth particular. The statute commences with a preamble which, in my opinion, is not repealed: "Whereas a kind of gaming has of late sprung up . . . by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices," &c. The mischief described is not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening of places called betting houses or offices. It is not betting, whatever may be its kind, which, independent of locality, is struck at, but it is the providing of a locality for particular kinds of betting which is the mischief to be dealt with. Then the enacting parts of the statute commence thus: "For the suppression thereof be it enacted," &c. "Thereof" does not mean "for the suppression of betting"; it refers to the recited mischief of betting in the new manner of betting, that is, by the manner of opening of places called betting houses or offices, which is a manner which brings about betting or makes it more easy for many to bet. Then the enactment proceeds, and the description of the locality is enlarged beyond the description of it in the preamble. It describes not only a place called a betting house or office, but says, "No house, office, room, or other place shall be opened, kept, or used." Still it is a kind of locality which can be opened, kept, or used. And in s. 2 this locality called a house, room, or place is one which can be taken and deemed to be a common gaming-house, in which persons not gaming may be found; into which the police may force entrance by breaking into it; and in which they may arrest and search people found in it, though those persons are in it without any purpose of gaming at all. Taking into account the mischief indicated in the preamble, and the description of the locality in the enacting part of the statute, the locality being a necessary part of the offence, and the word "place" being indefinite, and so indefinitely large that it must have some limitation, I can see no reason why the rule of construction as to the interpretation of general words in a statute

following particular or more limited words should not be applied. That rule requires an interpretation of the general words limiting them to matters or things of the same kind, as to the mischief being dealt with, as the previous words; but an interpretation as wide as the limitation just described will admit. Applying this rule of interpretation to the present statute, it seems to me that the place must be a place used for betting, which can for the purpose of betting be not unreasonably deemed to be a place of the same kind as a house, office, or room used for the purpose of betting. It need not be a building built like a house, room, or office; it need not be a covered place; it need not be railed off, or boarded off, so as to prevent physical access to it except through a particular part of the railing or boarding; but it must be a defined space, capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business. I think that the inclosure described and existing in this case was, in consequence of its structural condition, a defined space, capable of being used by a person desirous of so using it as if it were his house, room, or office, used as such for his betting business.

Then arises the second question, whether any person did so use the inclosure as to enable the Court to say that he used it as if it were his house, office, or room, used by him as such for his betting business. Now there are and must be some essential rights of a person using a place as his house, his office, or his room different from the rights as to it of persons who are not using it as their house, office, or room. He must have some right of user peculiar to himself and exclusive of their rights, if any. A man cannot be said to be using a room as his room or office if, when he comes to it, he finds it full of people, even if they have come to see him or to deal with him, and yet he has no right to say, "Make way or room for me to come into my room or office." A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit. The user by a person of a place as if it were his room or office necessarily implies some exclusive right in

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lord Esher M.R.

him as against some other persons. He may have partners in the room, or he may use part of the room as his office, whilst others have an independent right to use another part of the room as their office; but the part of the room or place which can be said in any reasonable sense to be used by him as his office must be a part which he claims to use and does use exclusively as his against some people. Applying that rule to the inclosure in question, the facts seem to me to shew that no one of the bookmakers described in the evidence does claim to use and does use any part of the inclosure as his part of it exclusively as against any one. To say that he uses or claims to use the spot of ground on which he is at the moment standing as his room, office, or place exclusively as against all the world, as if it were his room or office, is beyond all reason. So long, therefore, as an inclosure on a racecourse is used only as this inclosure was used, it cannot, in my opinion, be said to be a place used contrary to the prohibitions or subject to the penalties imposed by the statute. If an inclosure on a racecourse or elsewhere is used only as this inclosure was, no one can properly hold that the inclosure is being illegally used contrary to the statute. As matter of law, there is no legal evidence to bring it within the statute. If any other circumstance is added and relied upon in any other case, the whole case must then be considered subject to the rule I have laid down.

It follows that I do not agree with the interpretation put upon the statute or the application made of it to the facts in the case of *Hawke* v. *Dunn*. (1) It seems to me that the learned judges in that case did not rightly determine what kind of user of the place will bring it within the prohibition of the statute. Their judgment is open to this criticism, that, according to it, if a bookmaker makes what the judgment calls a ready-money bet in a place which it possible to use so as to make it a prohibited place within the statute, the mere fact of his so doing makes it a prohibited place. And it seems to me that this conclusion is founded on the view mentioned on p. 583, that one of the practices deemed to be

(1) [1897] 1 Q. B. 579.

objectionable was the practice of ready-money betting, wherever such betting was made, without reference to the locality in which such bet was made. With that view I cannot, as I have said, agree. I may repeat that, in my opinion, the mischief aimed at was not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening or keeping or using a place for the purpose of making, as a matter of business, such bets. The other cases which have been cited before us must be considered, if this judgment of mine is correct, as instances to which the rule now laid down must be applied. I cannot undertake by ingenuity to explain any of them away. I think that my present view of the statute is what I substantially stated, though not so elaborately, in *Bows* v. *Fenwick*. (1) Whether the statute was in that case rightly applied to what was called an umbrella may be doubtful. If the thing was really a tent I should think the decision right; if the thing was really an ordinary umbrella I think the decision was wrong. In *Snow* v. *Hill* (2) I think that A. L. Smith L.J. took the same view of the statute as I had done in *Bows* v. *Fenwick* (1), and do now. I think that the case of *Gallaway* v. *Maries* (3), the case of a betting-man standing on a stool to bet—was, with deference, wrongly decided. I must say that I think *Eastwood* v. *Miller* (4) was wrong. The defendant occupied the field and charged people for entering it. But I cannot see that he used it for the purpose of betting himself at all. I am of opinion that this appeal should be allowed.

LINDLEY L.J. This action is brought by a shareholder of a company to restrain it from carrying on its business in a manner alleged by the plaintiff to be illegal—namely, contrary to the provisions of what is now shortly called the Betting Act, 1853 (16 & 17 Vict. c. 119). An injunction has been granted by the Lord Chief Justice on the authority of *Hawke* v. *Dunn* (5), a considered and unanimous decision of a Divisional Court, and

(1) L. R. 9 C. P. 339.
(2) 14 Q. B. D. 588.
(3) 8 Q. B. D. 275.
(4) L. R. 9 Q. B. 440.
(5) [1897] 1 Q. B. 579.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lindley L.J.

which the Lord Chief Justice considered himself compelled to follow. No objection was taken before him nor before us that the Court had no jurisdiction to grant an injunction to restrain the commission of what is a criminal offence if the plaintiff is right. It has been assumed, and probably rightly, that the Court has jurisdiction to protect the shareholders of a company from a misapplication by the company of its property, although such misapplication may be punishable as a criminal offence. I will also assume such jurisdiction, and leave this point open for decision when raised and insisted on.

The present case was decided on admitted facts, and one of those facts—namely, what was common practice in 1853—is very important. The particulars describe in detail the inclosure complained of and the use made of it, and in the tenth particular it is stated that "at the time of the passing of the Betting Act, 1853, such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century." I presume that this statement could be proved, if not admitted, and that it is admitted simply to save the expense of formal proof. With these preliminary observations I proceed to consider the statute on which the case really turns.

The title, if part of the Act, the preamble, and the first twelve sections are all material; the other sections throw no light on them. An examination of the statute from its commencement to the end of s. 12 shews—(1.) that the object of the Legislature was, if possible, to suppress a kind of gaming which had then lately (in 1853) sprung up, and which is described in the preamble; (2.) that in order to attain this object betting-houses and other places are prohibited and are declared to be common nuisances and to be gaming-houses within 8 & 9 Vict. c. 109 (ss. 1, 2); (3.) that penalties are imposed on those who keep such places and on those who in any way advertise them (ss. 3, 4, 7); (4.) that places suspected of being such as are prohibited may be broken into and persons in them may be arrested, and all documents found therein and relating to racing

or betting may be seized (ss. 11, 12). The Act, in short, is aimed at betting-houses and at those who keep them; it is not aimed at betting anywhere, nor at persons who go to betting-houses to bet with those who keep them. The language of ss. 1 and 3 in some respects goes much further than that of the preamble, and, when clear and unambiguous, effect must be given to the wider language of the enacting sections. For example, the preamble mentions only "the opening of places called betting houses or offices and the receipt of money in advance by the owners or occupiers of such houses and offices, or by other persons acting on their behalf," whilst s. 1 plainly prohibits not only the opening, but the keeping and using of such places and betting with persons resorting thereto, whether they pay money in advance or not. The language of the prohibition being in these respects plain and unambiguous, it cannot be properly restricted by the language of the preamble. But when it becomes necessary to ascertain what sort of places other than betting-houses, rooms, or offices were aimed at, there is much more difficulty. No person can bet except in some place or other, and whenever he bets in any place he uses that place for betting. To construe "other place" or "place" in its ordinary sense of any and every place where persons can or do bet would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify betting-houses, rooms, or offices. But the Legislature clearly did not intend to prohibit and have not prohibited all betting, nor even all betting by persons who deposit their stakes. Some limitation must therefore be put on the expression "other place" or "place," and the real difficulty is to discover, first, what sort of place is prohibited; and, secondly, to determine whether the inclosure with which we have to deal on the present occasion is such a place. The language of the Act itself indicates what sort of place was aimed at by the Legislature, although no definition of the word "place" is to be found in the Act. The places aimed at are described as "places called betting houses or offices" (see the preamble); they are referred to as "house, office, room, or other place" (s. 1); as some place to which persons do or can resort for betting (s. 1); as some place where

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lindley L.J.

the business of betting is carried on (ss. 1, 3, 4); as some place used as a betting house or office, and which can be forcibly entered under a magistrate's warrant or an order of the Commissioners of Police (ss. 11, 12); as some place which can be advertised as a betting-place (s. 7); as some place which can be reasonably regarded as a common nuisance (s. 1); and which it is not absurd to treat as a gaming-house within 8 & 9 Vict. c. 109, s. 2. The sort of place aimed at can be gathered, though not very distinctly, from the language thus used; and it appears to me reasonably clear that a betting house or office is the type of place which the Legislature had in view; and that no place is within the Act which is so unlike a betting house or office as not to resemble it otherwise than by being a place where some persons sometimes bet, or even go to bet. I cannot bring myself to think that a place which is so unlike a betting house or office as an ordinary English racecourse is within the Act at all. This was the view taken by the Scottish Court in *Henretty* v. *Hart* (1), cited by Mr. Walton. On the other hand, there may be betting houses or offices or other places of that sort on a heath or anywhere where people congregate to see a race or any other exhibition. There may be a betting booth, or inclosure, or ring, or place, not easy to describe by any appropriate name, which sufficiently conforms to the type of a betting house or office to be hit by the Act; and I am not prepared to say that the cases of *Shaw* v. *Morley* (2), *Bows* v. *Fenwick* (3), and *Gallaway* v. *Maries* (4) were decided on any erroneous principle. The desk, the stool and umbrella, and the wooden box which had to be considered in those cases were held to conform to the type of a betting-office and to be prohibited accordingly. These cases seem to me to go to the very verge of the law in the application of the principle on which they were decided. *Doggett* v. *Catterns* (5) turned on ss. 4 and 5 of the statute, and the actual decision does not assist us. There was so much difference of opinion

(1) 13 Rettie, Court of Justiciary Cases, 4th Series, 9.
(2) L. R. 3 Ex. 137.
(3) L. R. 9 C. P. 339.
(4) 8 Q. B. D. 275.
(5) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.

about the meaning of a "place" that the case is a very unreliable guide on that head. *Eastwood* v. *Miller* (1) and *Haigh* v. *Sheffield Town Council* (2) are the only other cases prior to *Hawke* v. *Dunn* (3) which I think it necessary to notice. Both were cases stated by magistrates who found that the grounds there in question were places within the Act. The Court, therefore, had only to say whether there was evidence to justify such a finding, and the Court decided that there was. The Court came to the conclusion that it could not say as a matter of law that the magistrates were wrong. But bearing this in mind, *Eastwood* v. *Miller* (1) seems to have been merely a case of betting at a pigeon-match and went too far. In *Haigh* v. *Sheffield Town Council* (2) there were several circumstances to justify the finding of the magistrates—namely, the connection of the grounds with the house, the desks and stools, and clerks, which, if inside the house instead of outside, would have made the case an easy one. It would have been going a long way to say that there was no evidence there to support the finding of the magistrates.

Having pointed out to the best of my ability what sort of betting-place is prohibited, I pass on to consider whether the Reserved Inclosure with which we have to deal is the kind of place aimed at by the Legislature. It is a place where any one can go who chooses to pay 1*l.*; where bookmakers and others resort for betting purposes; where bets are made for money deposited as well as on credit; and where many persons go without betting or intending to bet, but simply to see the race and their friends and acquaintances. The place does not, in my judgment, come up to the type of a betting house or office such as the Legislature has prohibited. This conclusion is, in my opinion, strengthened by the preamble and by the statement as to the long existence and use of such inclosures as these before 1853. Having regard to this statement and to the preamble and to the ambiguity of the word "place" in the enacting clauses, I am unable to construe the Act as aimed at or as including such an inclosure as this, and used as this is. This conclusion is further strengthened by the fact that such

(1) L. R. 9 Q. B. 440. (2) L. R. 10 Q. B. 102. (3) [1897] 1 Q. B. 579.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Lindley L.J.

inclosures so used were not supposed to be illegal until the last two or three years. As regards the case of *Hawke* v. *Dunn* (1), I am of opinion that it was wrongly decided, and that sufficient attention was not paid to the type of place which the Legislature was aiming at. The decision can, in my judgment, only be supported by treating the Act as an Act for the suppression of betting instead of an Act for the suppression of betting in a particular description of place. The appeal ought to be allowed, and judgment entered for the defendants.

LOPES L.J. The plaintiff claims an injunction against the defendant company to restrain them from using, or knowingly permitting to be used, a certain inclosure at Kempton Park, known as the "Reserved Inclosure," for betting purposes, and from carrying on their business in a manner contrary to the provisions of the Betting Act, 1853, and contrary to their memorandum of association, and from expending the assets of the company in and about the conduct of such illegal business.

The case was heard before the Lord Chief Justice, and he granted the injunction, acting upon the recent decision in *Hawke* v. *Dunn*. (1)

The use of the inclosure for the purposes alleged, and the knowledge of the defendants that it was so used, were admitted, but it was contended that the inclosure was not "a place" within the meaning of the statute.

The inclosure in question is uncovered, and is about a quarter of an acre in extent. The public are admitted indiscriminately to this inclosure on making the required payment. Some are professional bookmakers; some others go there for the purpose of backing horses with the professional bookmakers; and others who do not bet at all. The bookmakers go there as a portion of the general public, and on the same terms in all respects. They have no special rights, privileges, or control beyond those possessed by the general public who frequent the inclosure. The bookmaker does not confine himself to any fixed spot in the inclosure, nor does he use anything brought on, or fixed to, the soil, such as a desk, stool, umbrella, or box, but is generally

(1) [1897] 1 Q. B. 579.

to be found in or near to the same part of the inclosure. No betting-lists are exhibited. Is this inclosure a place within the meaning of the Betting Act, 1853?

Betting per se is not illegal, and is only made illegal by the Act of 1853 if carried on in prohibited places. The Act of 1853 is a penal statute and must be construed strictly—by which I mean that the Court in construing such a statute must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the Legislature.

I accept the statement and have no doubt of its accuracy, namely, that at the time of the passing of the Act of 1853 betting of the same character as that complained of in this case had for many years previously been habitually and notoriously carried on on racecourses and in inclosures on racecourses, and has since that time been so carried on until quite recently without any suggestion of its being illegal.

I now approach the Act of 1853. It is called an "Act for the suppression of Betting Houses." The title, it is true, is no part of the Act, but, as was said by Jessel M.R. in *Sutton* v. *Sutton* (1), it is always on the Roll, and may be looked at in order to remove any ambiguity in the words of the Act. It cannot be used to control the express provisions of an Act; yet, if there be in these provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent, rather than at variance, with the clear title of the Act. Applying this rule to the present case, it is not too much to say that it shews the words "place" or "other place" were intended to have a restricted or limited meaning; otherwise the title of the Act might have been "An Act for the suppression of betting places." Again, look at the preamble: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money

(1) (1882) 22 Ch. D. 513.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

LOPES L.J.

on events of horse-races and the like contingencies." The only places mentioned are betting houses and offices, and the demoralization is said to be caused by a kind of "gaming of late sprung up." There is no mention of racecourses, though horse-races are evidently in the mind of the Legislature. Betting on racecourses and in inclosures on racecourses had existed for years, and could not be said to be "a kind of gaming of late sprung up." On the other hand, betting in betting-houses was new, and was in 1853 regarded as an evil to be remedied.

The rule is that, when the words of the enactment are clear, the preamble is to be disregarded, but, when the words are equivocal, effect is to be given to it to the extent that it shews what the Legislature are intending, and, if general language is used in the enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply.

It cannot be said that "place" or "other place" was intended to include all places. If so, it would amount to this, that the Act was passed to suppress betting, for no person, so far as I know, can bet without occupying a place, if it is only the place upon which he is at the time standing; and, if he bets, he uses that place for betting. Both the title of the Act and the preamble of the Act indicate some limitation to be put on the words "place" or "other place." But what limitation? That is to be gathered from the words used in the first four sections of the Act, "house, office, room, or other place" and "house, office, room, or place." Surely the doctrine of "noscitur a sociis" or "ejusdem generis" is applicable here. That doctrine may be thus expressed, namely, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. A good illustration of what I mean is the case of *Powell* v. *Boraston* (1), where it was held that "other building" to qualify for the parliamentary franchise under s. 27 of the Reform Act, 1832, must be something substantial and ejusdem generis with the preceding words "house, warehouse, counting-house,

(1) (1865) 18 C. B. (N.S.) 175.

shop." I cannot hold that an open racecourse, or open inclosure on a racecourse, is ejusdem generis with house, office, or room, an inclosure where there is no structure of any kind, nothing brought upon or fixed into the soil, and no appropriation of any fixed spot, and to which the public are indiscriminately admitted.

But, if we further examine the statute, we shall find further indication that this statute was never intended to apply to racecourses, or inclosures on racecourses used for betting. By s. 2 the place struck at is to be deemed to be a common gaming-house within the 8 & 9 Vict. c. 109, and may be indicted as such. How could an inclosure on a racecourse by any stretch of the imagination be deemed to be a gaming-house? Sect. 7 again does not seem applicable to an inclosure on a racecourse, but rather to something like a house, office, or room which can be advertised. Then, again, s. 11, authorizing police constables to enter by force, "whether by breaking doors or otherwise," and to search, and to seize all lists, cards, or other documents relating to betting, found in such house or premises, points rather to betting-houses or places resembling a house, room, or office than to an open inclosure on a racecourse. Sect. 12 is very significant. It enables a commissioner of police to authorize any superintendent of police to enter any house, office, room, or place, if he suspects that such house, office, room, or place is kept or used as—what? As a "betting house or office." How could this inclosure be used as a betting house or office? I cannot think that a place so unlike a house, office, or room as this inclosure can have been contemplated by the Act. If this inclosure is within the Act, why not the whole racecourse? Why not any place where a man stands and bets? So to hold would be equivalent to holding that betting anywhere and everywhere is illegal, and would make it difficult to understand why the Act of Parliament specified any places. The Act was intended to strike at betting-houses, or something resembling a betting-house, where betting was carried on, but was not intended to interfere with betting on racecourses such as had been carried on for very many years before the passing of the Act. If the contention of the respondent is correct, the

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

LOPES L.J.

Act of 1853 should have been intituled an Act, not for the suppression of betting-houses, but for the suppression of betting. In my judgment *Hawke* v. *Dunn* (1) was wrongly decided. That case has carried the law further than any of the previous cases, and cannot be supported.

I think it unnecessary to refer at any length to the previous authorities. They are all distinguishable from the present case. The cases most relied on by the respondent were the cases of a desk, stool, umbrella, and box placed upon or fixed in the locus in quo. I do not believe that in any of those cases a conviction would have taken place, if the desk, stool, umbrella, or box had not been present, and the Court had been asked to hold the locus in quo prohibited under the Act without such accessories. There is no desk, stool, umbrella, or box in the inclosure, and, as I have said before, nothing that can be said to have any resemblance to a house, room, or office used for betting.

Whether the construction of the statute was not somewhat strained in these cases to which I have last referred it is unnecessary for the purposes of this case to decide.

In *Gallaway* v. *Maries* (2), which was heard by Grove J. and myself, and which was the box case, I felt great hesitation in holding that a wooden box such as described could be a place within the meaning of the Act, but considered that I was bound by previous decisions. Each case must depend on its own particular circumstances, and it is not difficult to imagine something placed on a racecourse, which without being a house, room, or office would so resemble them, and so partake of their nature, when used for betting purposes, as to come within the meaning of the Act. I do not attempt to define what is a "place." All I say is, and that I say without hesitation, that this inclosure is not a place within the meaning of the Act of Parliament.

No point has been made that an injunction will not lie to restrain the commission of a criminal offence. I believe that it will lie when its object is to protect the shareholders of a company from any misapplication of its property, although

(1) [1897] 1 Q. B. 579. (2) 8 Q. B. D. 275.

such application may be punishable as a criminal offence. The appeal will be allowed.

A. L. SMITH L.J. This action is brought to review in a court of appeal a judgment given in the Queen's Bench Division in the case of *Hawke* v. *Dunn* (1), and the real question to be determined, disregarding the form in which the action is brought, is whether a professional bookmaker, who carries on his business in the accustomed manner, moving about an inclosure at a race-meeting, betting with those of the public who are desirous of betting with him, sins against the provisions of the Act of 1853, intituled "An Act for the suppression of Betting Houses" (16 & 17 Vict. c. 119).

If such bookmaker sins against the Act, so do all owners of racecourses who knowingly and wilfully permit such bookmaker to carry on his calling in the inclosures thereat, and each, whether bookmaker or owner of a racecourse, is liable to fine or imprisonment with or without hard labour for not exceeding six calendar months, and every person who may happen to be within the inclosure when a professional bookmaker is there plying his calling is liable to be arrested and searched and taken before a justice of the peace.

Although the Statute Law Revision Act of 1892 (55 & 56 Vict. c. 19) in one particular deals with this Act of 1853, as also does the Short Titles Act of 1892 (55 Vict. c. 10), they are wholly immaterial to the present case, and the Act of 1853 must be construed as if those Acts had not been passed and the question had arisen shortly after the Royal Assent had been given to the Act of 1853 upon August 20 of that year.

Before I turn to this Act (upon the true construction of which the decision of this case entirely depends), I must point out that prior to its passing all kinds of betting, whether by professional bookmakers or by the public, were perfectly legal, no matter where the bets were made, or whether carried on upon credit, or by the payment of money by way of deposit on bets, which is called "ready-money betting." In the year 1845 the Legislature had enacted (8 & 9 Vict. c. 109, s. 18), that all

(1) [1897] 1 Q. B. 579.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

contracts or agreements by way of gaming or wagering should thereafter be null and void and incapable of being enforced in any court of law or equity, so that bets after the passing of the Act of 1845 won upon horse-races or other events became mere debts of honour incapable of being enforced, but the bet itself or betting in general, whether upon credit or by way of ready money, wherever carried on, was in no way made illegal, the only disability attaching thereto being that money won by betting could not be recovered if the loser did not choose to pay. Thus far the Legislature had gone, and so matters stood at the time when the Act for the suppression of betting-houses came to be passed in 1853.

The material facts of this case, and which are admitted to be correct, are as follows: At Kempton Park Racecourse there is a piece of ground of about a quarter of an acre in extent, known as the Reserved Inclosure, which is inclosed by iron rails. Persons are admitted to this inclosure on race-days, varying in number from 500 to 2000, amongst whom there are always professional bookmakers, varying from 100 to 200 in number. These bookmakers are admitted to this inclosure as members of the general public and upon the same terms, both as to payment and readmission. These bookmakers have no rights, interest, or control in or over the inclosure, nor have they any special rights or privileges therein. Each bookmaker is accompanied by a clerk. The bookmakers do not confine themselves to any fixed spot in the inclosure, nor do they use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same spot of the inclosure. In this inclosure these bookmakers carry on their business in competition with each other, betting with those of the public who are within the inclosure, and who may be desirous of betting with them, whether upon credit or by way of "ready-money betting." It is also admitted to be the fact that from the commencement of the present century, that is, for at least half a century before the passing of the Act of 1853 for the suppression of betting-houses, and down to the present time, inclosures at race-meetings similar to that at Kempton Park have been frequented

by bookmakers who have therein openly and habitually carried on betting transactions of precisely the same character as those carried on by the bookmakers in the present case, that is, upon credit and by way of ready money, and that until recently there had been no suggestion that such betting was illegal.

These being the facts of this case, I come to the question what kind of betting has the Act of 1853 for the first time made illegal. It cannot be said that it has made betting upon horse-racing, or other events, per se illegal, for it has done nothing of the kind; and, when I turn to the preamble of the Act which in my opinion must first be read, there is no obscurity as to what the Legislature aimed at when it passed the Act in question. The preamble recites: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies; for the suppression thereof be it enacted." I pause here to see whether in this part of the Act (and which, be it remembered, is the part in which the Legislature has declared the object it had in view in passing the Act) it can be said that the business of a professional bookmaker, when carried on by him in an inclosure at a race-meeting in the ordinary way in the circumstances above stated, was aimed at by the Legislature, and was the mischief it intended to put down. Assuredly it cannot be so said. First of all, the business of a professional bookmaker at a race-meeting, whether on credit or for ready money, was not "a kind of gaming which had of late sprung up." It was as old as the present century. Secondly, bookmakers at a race-meeting ordinarily "open no places called betting houses or offices" or anything equivalent to them, nor "as owners or occupiers of such houses or offices" do they "receive money in advance." Thirdly, it will be noticed that this then well-known business of a professional bookmaker at race-meetings is not mentioned in this preamble, and it will not be found alluded to throughout the Act. It appears to me, when this part of the Act is

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

considered, that the then well-known business of professional bookmakers at race-meetings was not only not aimed at by the Legislature, but was purposely omitted; for it is inconceivable, if the object of the Legislature was to bring the accustomed business of professional bookmakers at race-meetings within the meshes of the Act, which business for upwards of half a century had been notoriously carried on thereat throughout the kingdom, that the preamble should have confined (and I think studiously confined) the declared object of the Act to a kind of gaming which had then of late sprung up by the opening of places called betting houses or offices and the receipt of money in advance by the owners and occupiers thereof. Moreover, it appears to me to be out of all reason to think that this Act for the suppression of betting houses and offices was aimed at the owners of racecourses who permitted their inclosures to be used in the then well-known and accustomed manner. Mr. Asquith, in a very excellent argument for the respondent, sought to get rid of the effect of this preamble by making his point upon a later part of the Act, which I have hereafter to deal with.

Now what effect has the preamble of an Act of Parliament when the Act has to be construed? I do not doubt that, if the words of the enacting part of an Act of Parliament are clear and unambiguous, they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shewn to be its object by its preamble. But the preamble must always play an important part in the construction of a statute. Dyer C.J. calls the preamble of a statute "a key to open the minds of the makers of the Act and the mischiefs which they intended to redress": *Stowel* v. *Lord Zouch.* (1) Lord Coke said: "The rehearsal or preamble of the statute is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof": Co. Litt. 79 a, 4 Instit. 330; and Lord Tenterden, when delivering the considered judgment of the Court of King's Bench in *Halton* v. *Cove* (2), in the year 1830, thus sums up the matter. He says: "It is very true, as was argued for the plaintiff, that the enacting words of an Act of Parliament are

(1) Plowd. 353, at p. 369. (2) (1830) 1 B. & Ad. 538, 558.

not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet on a sound construction of every Act of Parliament I take it the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and that the preamble affords a good clue to discover what that object was." Mr. Asquith's contention is that the enacting parts of the Act of 1853 are such that they clearly extend the Act beyond the limited objects declared in its preamble, and that bookmakers carrying on their business within inclosures at race-meetings in the ordinary way are within the enacting parts of the Act notwithstanding its preamble; and he must admit, if this be so, that owners of racecourses who knowingly and wilfully permit such business to be carried on within their inclosures are equally liable with the professional bookmaker to fine or imprisonment.

Then what is it that this Act of 1853 in its enacting parts has enacted? By s. 1 it enacts, firstly, that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof or any person using the same . . . . or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto"; that is, betting either on credit or by way of ready money; and secondly, that no house, office, room, or other place shall be opened, kept, or used, "for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, &c." This in express terms hits what is in the preamble, namely, betting by way of deposit. This section does go beyond the preamble in this, that it embraces and renders illegal betting by way of credit, which is not within the preamble, as also betting by way of ready money which is within the preamble, but only, be it observed, if either takes place in the prohibited premises. There are also other words in the enacting section

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

which I will refer to hereafter. These two classes of betting were held to be distinct offences by Lord Coleridge C.J. and Collins J. in *Bond* v. *Plumb*. (1) This first section thirdly enacts that "every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them" (that is for betting on credit or by way of ready money) "is hereby declared to be a common nuisance and contrary to law." Sect. 2 enacts "that every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of" the Act of 1845 (8 & 9 Vict. c. 109) "to amend the law concerning games and wagers." If a house is proved to be a common gaming-house, all persons found therein may be arrested, searched, and brought before a justice of the peace, and every owner or keeper of such house, and every person having the care or management thereof, is liable to a maximum penalty of 100*l*. or six months' imprisonment with or without hard labour. Sect. 11 appears to me to have practically the same effect as s. 2; and it gives express power of entry into any house, office, room, or place kept or used as a betting house or office, and, if necessary, to use force for making such entry whether by breaking doors or otherwise, and it also gives express powers of arrest and search therein. Sect. 12 gives similar powers to the metropolitan police within the metropolis.

So much for the sections relating to the premises on which betting is prohibited by the Act. I now come to s. 3, which deals with the persons owning, occupying, or using the same. This section makes the doing of three things criminal, and subjects the offender to penalties similar to those above mentioned. The first offence is for any person "being the owner or occupier of any house, office, room, or other place, or a person using the same," to "open, keep, or use the same for the purposes hereinbefore mentioned, or either of them," that is, betting with persons resorting thereto, i.e., upon credit or by way of ready money; the second offence is for any person, "being the owner or occupier of any house, room, office, or other place," to "knowingly and wilfully permit the same to be opened, kept

(1) [1894] 1 Q. B. 169.

or used by any other person for the purposes aforesaid or either of them," that is, betting on credit or by way of ready money; and the third offence is for any person to have the care or management of or in any manner assist in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or either of them, which means the assisting in the conduct of the business of a betting-house for carrying on betting either on credit or for ready money. Neither this section nor the Act prohibits persons other than professional betting-men resorting to betting-houses for the purpose of betting therein, though if found therein they are liable to arrest and search, and to be taken before a justice of the peace.

When the preamble and these sections of the Act are read together, as they must be in order to understand the true scope of the Act, in my judgment the enacting sections have reference to the opening, keeping, and using of betting houses, offices, and rooms, "or other places" akin or equivalent thereto, wherein the business of a betting-house or betting-office is carried on. There are, it is true, words in the enacting sections which are not to be found in the preamble, for instance, the words "room or other place," "any person using the same," "any person having the management of the business"; but these words were inserted, in my judgment, not for the purpose of extending the operation of the Act, and of embracing cases not within its operation, but for the better carrying out the object intended, and reaching every kind of evasion which might otherwise have been attempted, and that this was the view of Lush J. will be seen upon reference to a passage in his judgment in the case of *Haigh* v. *Sheffield Town Council* (1), in which passage I entirely agree. In my opinion, when the Legislature added throughout the enacting sections of the Act the words "other place" or "place," and abstained from defining, as it did, what those words should mean, it did so, not for the purpose of extending the ambit of the Act, but in order to leave it to the Court, as each case arose, to determine whether the individual charged was or was not in fact attempting

(1) L. R. 10 Q. B. 102, at p. 109.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

to evade and evading the Act by carrying on the business of a betting-house in "a place" akin or equivalent to a betting house or office, though not actually in a house or office. It is for this purpose that the words "room," "other place," "place," "any person using the same," "any person having the management of the same," were added. If a person carries on the business of betting in a place akin to a betting-house, whether such place is set up upon a racecourse or elsewhere, then he is guilty of the betting made illegal by the Act, for he is then carrying on the business of a betting-house in a prohibited place. There must however be an user such as takes place in the keeping of a betting house or office to be within the Act, and the user of a place in common with mankind in general is not such an user as is contemplated by the Act. It is this user of the prohibited place for the business of betting which is struck at by the Act. This, in my judgment, is the true construction of the Act for the suppression of betting-houses. The Scottish case of *Henretty* v. *Hart* (1), cited by Mr. Joseph Walton, supports my view of the Act.

I now come to those cases decided upon the Act which have an important bearing upon this case. There are but three cases in the books, during the forty-four years the Act of 1853 has been in operation, in which professional bookmakers at race-meetings have been proceeded against under the Act. In each the bookmaker was convicted, but the grounds upon which the convictions were upheld are most significant. The first case is that of *Shaw* v. *Morley* (2) in 1868, which related to a plot of ground outside the inclosure at Doncaster Race Stand, upon which had been erected a wooden structure of five feet high fronting two ways, one to the course, the other to the inclosure. It was covered with green baize, and had boards used as desks fronting each way. Upon this structure were the words "William Nicholl of Nottingham," and papers, partly printed and partly written, with the names of the race-horses and betting prices. The betting-lists so exhibited had on them the odds upon and against each horse in each race, which "William Nicholl, the proprietor of the structure, was

(1) 13 Rettie, Court of Justiciary Cases, 4th Series, 9. (2) L. R. 3 Ex. 137.

willing to bet." The appellant Shaw transacted the betting business so carried on at one frontage of this structure for Nicholl. Kelly C.B., Martin B., and Pigott B. held that what Shaw was doing was within the 3rd section of the Act, and quite rightly, for what he was doing was in truth and in fact carrying on the business of a betting house or office, if not in a betting house, office, or room, at any rate in a place akin or equivalent thereto, and using it as such, and he was therefore carrying on betting in a prohibited place. If Shaw had not been convicted because he was not in fact using a betting house or office, the Act would clearly have been evaded, for, as I have said, a man may well set up and use a betting house or office, or other place akin or equivalent thereto, upon a race-course, and carry on the business of a betting-house thereat. The next case is that of *Bows* v. *Fenwick*. (1) This case went a step in advance of the last, but was really decided upon similar grounds. In this case a professional bookmaker, upon the Roodee at Chester, during the races stood upon a stool two feet six inches high, over which was a large umbrella, capable of covering several persons, upon which was painted "G. Bows, Victoria Club, Leeds," and which umbrella was fixed into the ground with a spike. There was also a card exhibited, "We pay all bets first past the post." The Court, which consisted of Lord Coleridge C.J., Brett J., and Denman J., held that this business, so carried on by the bookmaker, was within s. 3 of the Act of 1853, because the bookmaker was carrying on his business in a fixed and ascertained place. By Lord Coleridge C.J., the kind of gaming prohibited by the Act was the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto. By Brett J., "it is necessary that it should be a fixed place, whether on a racecourse or elsewhere." By Denman J., the case was within the Act because "there was a piece of ground ascertained and appropriated by the appellant for carrying on his proceedings." The ratio decidendi of these learned judges appears to me to be that the evidence shewed that the appellant was carrying on his business of betting within a prohibited

(1) L. R. 9 C. P. 339.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

place, that is, a place akin or equivalent to a betting house or office, and this was the inference which they drew from the facts proved. I do not dissent from this inference, but I think that it is the limit to which the provisions of the Act can be extended. The last case is that of *Gallaway* v. *Maries*. (1) In this case the Court went further, and, with submission, I think went too far. In this case a bookmaker, together with a companion, carried on his business of betting at Four Oaks Park races within the inclosure, the companion standing upon a small wooden box unattached to the ground. The Court (Grove J. and Lopes J.) held this to be within s. 3 of the Act of 1853. Grove J. so held because the box defined a certain spot; and Lopes J., with much doubt, after pointing out that placing down a piece of matting and standing upon it would have been the same thing, but, thinking himself governed by *Bows* v. *Fenwick* (2), assented to upholding the conviction. I cannot think that the correct inference in this case was drawn, namely, that the appellant was keeping or using a place akin or equivalent to a betting house or office. But whatever may be said of these three cases, there is this undeniable fact apparent in each, that not one of the eight learned judges who respectively decided them (Kelly C.B., Martin B., Pigott B., Lord Coleridge C.J., Brett J., Denman J., Grove J., and Lopes J.) would have held the convicted bookmaker to have brought himself within the Act of 1853 had it not been for the special user he had made in the particular case of the desk, the stool and umbrella, and the box. It is immaterial whether the right inference was drawn or not from the proved facts of these cases; the point, and a most important point it is, is that not one of these learned judges would have held the point tenable that professional bookmakers by using an inclosure at a race-meeting, as they did in the present case, had brought themselves within the Act of 1853, and had it not been for the special user that had been made of the desk, the umbrella and stool, and the box in these cases, the convictions would obviously have been quashed. There is therefore a formidable consensus of judicial opinion to be set off against the opinion

(1) 8 Q. B. D. 275. (2) L. R. 9 C. P. 339.

of the five learned judges who decided in the present year the case of *Hawke* v. *Dunn*. (1) I do not propose to deal with the numerous cases which have arisen about the user of rooms at public-houses by betting men when carrying on their business of betting with persons resorting thereto, for the words "house" and "room" are specifically mentioned in the Act as two of the prohibited places, when used by a betting-man for the carrying on the business of betting therein, and in my judgment these cases have no application to betting in an inclosure at a racecourse in the usual way as in the present case. There are however two cases (decided in 1874) to which I must refer. The first is *Eastwood* v. *Miller*. (2) In this case the occupier of inclosed grounds containing nearly four acres was charged that he did "unlawfully use a certain place, to wit, a field, for the purpose of betting on a certain pigeon-shooting match for money contrary to 16 & 17 Vict. c. 119, s. 3." It is true that professional bookmakers were present, but Lush J. apparently took the question to be whether the appellant "used or permitted the place to be used for the purpose of betting"; and Archibald J. said: "There are two questions, first, whether this is a place within the meaning of 16 & 17 Vict. c. 119, and, secondly, whether there is evidence that it was permitted to be used for the purpose of betting." I must point out that, if this was the question, there was no offence committed, for it cannot be contended that owning, occupying, keeping, or using a place for persons betting therein inter se is any offence within the Act. It is, too, remarkable that neither of the cases of *Shaw* v. *Morley* (3), in 1868, nor of *Bows* v. *Fenwick* (4), of May 4, 1874, were called to the attention of the Court. It may be that the latter case had not, upon June 3, 1874, when *Eastwood* v. *Miller* (2) was decided, been published in the Reports, and it should also be noticed that *Eastwood* v. *Miller* (2) was only argued on one side. If this decision decided that a professional bookmaker moving about a four-acre field, betting with persons desirous of betting with him, is using a place akin or equivalent to a betting house or

(1) [1897] 1 Q. B. 579.
(2) L. R. 9 Q. B. 440.
(3) L. R. 3 Ex. 137.
(4) L. R. 9 C. P. 339.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

A. L. Smith L.J.

office, and as such is usually used, I respectfully say that in my judgment the decision is wrong. The other case is that of *Haigh* v. *Sheffield Town Council* (1), in which the appellant was charged with keeping and wilfully permitting a cricket-ground of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. Fifteen or twenty professional bookmakers stood on chairs and stools in different spots, betting with different persons, and had each a man behind him recording the bets. The magistrates convicted the appellant, and the Court of Queen's Bench (Blackburn, Mellor, and Lush JJ.) held they were right. If this conviction had been supported upon the inference drawn in *Bows* v. *Fenwick* (2) I should have had nothing to say to it, but it does not appear to have been so. Blackburn J. said (3): "By s. 3 it is made an offence in the owner or occupier to permit the place to be kept or used for the purpose of betting. It must be taken on the statement of the case that the appellant was well aware of what was going on," and that "the magistrate was therefore right in saying the appellant did permit the place to be used for betting." To use or permit a place to be used for the purpose of betting, as before pointed out, is no offence at all; but to use or to permit a betting house, office, room, or other place akin or equivalent thereto to be used for the purpose of carrying on the business of a betting house or office, is the offence created by the Act, and what is rendered illegal. If this case decides that professional bookmakers moving about a field, betting with those of the public who are willing to bet with them, are carrying on the business of a betting-house in a place akin or equivalent to a betting house or office, I do not agree with it, and I think, if this be so, that this decision as well as *Eastwood* v. *Miller* (4) is wrong. Lord Coleridge and I in the case of *Snow* v. *Hill* (5) held that the appellant, who was charged that, "being a person using a certain place" (to wit, a reserved portion of a field), he "unlawfully did use the said place for the purpose of betting with persons resorting thereto,"

(1) L. R. 10 Q. B. 102.
(2) L. R. 9 C. P. 339.
(3) L. R. 10 Q. B. at pp. 105, 107.
(4) L. R. 9 Q. B. 440.
(5) 14 Q. B. D. 588.

was not within the Act of 1853, because he exercised his business of bookmaker upon no ascertained piece of ground, in other words, upon no premises akin or equivalent to a betting house or office as in *Shaw* v. *Morley* (1), *Bows* v. *Fenwick* (2), and as had been held in *Gallaway* v. *Maries* (3), and we followed the more recent cases in preference to *Eastwood* v. *Miller* (4) and *Haigh* v. *Sheffield Town Council* (5), decided in 1874. It is a mistake to say, as Hawkins J. said in *Reg.* v. *Preedy* (6), and again in *Hawke* v. *Dunn* (7), that we decided *Snow* v. *Hill* (8) upon the ground that there was no evidence that the bookmaker was carrying on the business of a bookmaker, but was only carrying on betting as one of the public. The view taken by Lindley L.J. of *Snow* v. *Hill* (8) in *Liddell* v. *Lofthouse* (9) is correct, and I also entirely agree in his judgment therein, when he drew the inference and held that the hoarding in that case was "a place" within the meaning of the Act. What Lindley L.J. said of the case of *Doggett* v. *Catterns* (10) I also agree with, and have nothing to add thereto.

For the reasons above, I am of opinion that to use an inclosure at a race-meeting as it was used in the present case in common with the rest of the public is not the user of a place akin or equivalent to a betting-house, or betting-office, which is what is prohibited by the Act.

In my judgment the case of *Hawke* v. *Dunn* (7) was not correctly decided, and the Court was not justified in extending the meaning of the Act as it has done, which it did by in reality striking out the dominant words "house," "office," "room," and relying upon the words "other place," as if they were the dominant words of the section. If this construction of the Act be correct, the dominant words of the Act are mere surplusage, which is a construction I cannot adopt, and in my judgment this appeal must be allowed.

(1) L. R. 3 Ex. 137.
(2) L. R. 9 C. P. 339.
(3) 8 Q. B. D. 275.
(4) L. R. 9 Q. B. 440.
(5) L. R. 10 Q. B. 102.
(6) 17 Cox, 433.
(7) [1897] 1 Q. B. 579.
(8) 14 Q. B. D. 588.
(9) [1896] 1 Q. B. 295.
(10) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

RIGBY L.J. I have the misfortune to differ in this case from my learned brothers, but, as I have formed an opinion differing from theirs, I feel bound to give my reasons at considerable, but I hope not undue, length.

The facts admitted in this case, so far as they appear material, are as follows. The "Reserved Inclosure," as it is called, is part of the lands called the "Kempton Park Racecourse," owned and occupied by the defendant company, and does not exceed a quarter of an acre in area. Its linear dimensions appear to be about forty yards by thirty. At one end, being that most distant from the actual racecourse, it consists of raised tiers of seats covered over with a roof forming part of the grand stand. The rest of the inclosure is fenced off from the adjoining land by iron rails, but it is not covered in. Professional betting-men, or bookmakers, frequent the inclosure on race-days in numbers varying from 100 to 200. The whole number of persons admitted to the inclosure on race-days varies from 500 to 2000. The bookmakers attend for the purpose of carrying on their business there in manner described in the particulars. Of other members of the public frequenting the inclosure the greater number go there for the purpose of backing horses with bookmakers, but a certain number do not bet at all. The bookmaker in the inclosure invariably carries on the practice of betting there as described in the particulars. He does not confine himself to any fixed spot in the inclosure, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the inclosure. With a few exceptions, when betting takes place on future events, the betting is confined to betting on the races of the day; and no betting commences on any individual race before the names of the horses which are going to run in that race are announced on the telegraph board, usually about a quarter of an hour before the time appointed for the race to be run. Such betting is known as post betting, and continues in most cases till the fall of the flag when the horses start, and bets are frequently made while the race is being run. Members of the general public are generally backers, and each selects as a rule one horse which

he desires to back. In general it is the object of the bookmaker to back the field against as many horses as possible. These general propositions are however subject to important exceptions as pointed out in the particulars. The practice of calling out the odds which he will give or take in respect of a particular horse is largely adopted by every bookmaker betting in the inclosure, for the purpose of attracting the attention of backers. No person in the inclosure is admitted with, or has any greater or less right to act as a bookmaker than any other person, although in fact and practice the limited number of persons who do act in that capacity collectively form the market for such bets as the rest of the public or the backers wish to make. Some bookmakers carry on a ready-money business in the inclosure, that is they usually require the backer to deposit his stake in respect of the bet at the time the bet is made. Others do the greater part of their business on credit, that is to say, no money is deposited on either side, but they only do business in this way with persons whom they know to be of good credit. Should any person unknown to them offer to bet with them, they would either decline to bet or require such person to deposit his stake. All the above facts are to be found in the pleadings or particulars, and are taken and admitted to be true. In their defence (par. 2) the defendant company denied that it knowingly and wilfully permitted the inclosure to be used for the purposes alleged, but before the Lord Chief Justice, and again before the Court of Appeal, it was distinctly admitted that the defendant company, knowing the facts as to the user of the inclosure above referred to, went on admitting persons to the inclosure and charging them an extra fee for admission thereto, and in that sense permitted the user. On this admission it would seem that the defendant company does in law permit the user such as is shewn in the particulars of the inclosure. As a sort of supplement to the particulars, there is an important statement of fact with reference to what has taken place in other inclosures, which, so far as is necessary, will be dealt with hereafter when the effect of the preamble is considered.

On the admitted facts the following observations occur.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

The area of the inclosure does not equal that of many rooms that might be mentioned. If there was an average attendance of bookmakers (150), the whole area (about 1200 yards) would afford on an average for each bookmaker, if they distributed themselves evenly, about eight superficial yards, the area of only a very small room or office of eight feet by nine feet. If however, as is probable, the bookmakers take their positions on the outside of the inclosure, as being the place where they would be most easily found, there would not be a lineal yard for each bookmaker. It is true that the position of a particular bookmaker in the inclosure is not fixed to any particular spot, or indicated by any mark, but, as he is usually to be found in or near the same part of the inclosure, it seems plain that he must practically confine himself to a space in the inclosure not exceeding the dimensions of a very small room. During the quarter of an hour or so within which the betting on a particular race is practically confined, the inference must be that for practical purposes he may be as easily found by those who look for him, as though he were all the time seated at a desk, or standing on a box or platform of his own. During the same time his opportunities of betting with persons who resort to the inclosure, and their chance of finding him to bet with, will be as great as if he were in a house, room, or office. Lastly, subject to the question whether the inclosure is a place within the meaning of the Act, it is plain that the kind of betting carried on there is that which was struck at by the Act, for the bookmakers not only bet with persons resorting to the inclosure, but receive deposits on promises to pay, though this practice is subject to the limitations mentioned by the particulars.

The three main points for decision are—(1.) Whether the inclosure is a place within the meaning of the Act. (2.) Whether it is kept, or permitted to be used by the defendant company for any purpose forbidden by the Act. (3.) Whether there is anything in the Act from which it can safely be inferred that such an inclosure was intended to be excepted.

Having regard to the admission made at the trial, No. 2 seems to depend upon the question whether within the

meaning of the Act the inclosure is used by the bookmakers frequenting it.

It will be convenient to deal first with the enacting clauses, which must govern, unless there be some ambiguity which makes it permissible to refer to the preamble. Sect. 1 contains the leading enactment which has to be construed. Leaving out words inapplicable to the present case, the section provides that no house, office, room, or other place shall be opened, kept, or used for the purpose of . . . . any person using the same for betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of a person using the same as a consideration for a promise to pay money on any event relating to a horse-race.

It is reasonably plain from the enacting clauses that the very general word "place" as used here must receive some limitation. If a man were to use within the meaning of the Act every place on which he happened to stand when he made a bet, or received a deposit, the operation of the statute would prevent any person carrying on the business of a bookmaker, or perhaps any betting at all. A "place" however need not be a house, office, or room. Such a construction would be equivalent to striking it out of the Act. It is said that it must be ejusdem generis with house, office, or room. But the difficulty in such a case is to determine the genus which is to comprise as species all the cases that have to be dealt with, and, as that can only be gathered from the Act taken as a whole, not much, if any, assistance can be obtained from the ejusdem generis doctrine. It will be safer and easier, and at the same time sufficient for the present case, to indicate some places that must be included rather than to attempt a definition to cover all places that ought to be included in the Act.

The words "other place" being obviously introduced to supplement the words "house, office, or room," it would be wrong to exclude any place the use of which involves exactly the same mischief. Perhaps it would be safe to say that no place should be excluded to which persons can resort with a reasonable business probability of being brought into contact

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

there for practical betting purposes with a person or persons using it for betting with those who do resort to it, if the latter choose to bet. At any rate, it would seem clear that mere variation in the physical condition of a place accessible as a place of resort, as, for instance, whether the place is or is not covered for the time being wholly or partially by a roof, cannot form the test for determining whether it falls within the Act or not. An uncovered yard whether or not included within the curtilage of a house, an uncovered skating-rink or skittle-alley, a piece of building ground for the time being either entirely vacant, or with buildings in no way covered in, are all cases in which the mischief and nuisance arising from their being used for the purposes forbidden by the Act would be in no way increased by covering them in, or mitigated by their being left uncovered. The same thing may be said of the way in which a place is bounded, except perhaps that an inclosure surrounded by an open railing, or a place uninclosed, but capable otherwise of identification, may be more of a nuisance than one which is entirely fenced off by walls of masonry from the view of, and so as to prevent interference from within with the outside public. If an inclosure similar in all respects to that which is being dealt with in this case were found to be used in a town for purposes similar to those for which the Reserved Inclosure is used, it would seem impossible to contend that it would not be a place within the meaning of the Act. There is nothing in the Act to indicate that places within its operation must be in towns.

(2.) With reference to user: it is plain that the same rules which apply to houses and rooms must apply in general to places which are not houses or rooms, but still are within the Act. Now it seems impossible to say that a man does not use a house or a room which as a whole is set apart by the owner or occupier, or permitted by him to be used, for purposes forbidden by the Act, unless he confines himself to one spot in the house or room, as the case may be. The house may contain many rooms, or the room be very large, but the man is using the house or room when he uses any part of it, and the Act has in it nothing to suggest that absolute fixity of position or any

other localization of the user than is involved by the boundaries of the house or room itself is necessary.

Again it seems impossible to say that the user of a house or room, to fall within the Act, must be an exclusive user by one person of the whole or any particular part. First of all, this would involve the change of the more general phrase "any person using" into the more restricted phrase "the person using," for which there is no warrant. But further, such a construction of the Act would leave it open to avoid its operation in a vast number of cases, though the mischief struck at remained or was increased. It seems impossible to contend successfully that the use of a house or room with the permission of the owner and occupier by one professional betting-man is more of a nuisance or otherwise more objectionable than a similar use by more than one either jointly, or one competing with another, at the same time. Indeed, the more bookmakers permitted to use the house or room at the same time, the greater would be the nuisance, and the greater the probability of mischief.

The same considerations must in general apply to any place, not being a house or room, which is brought within the meaning of the Act.

But several objections to this construction as applicable to the present case have been urged. It is said that s. 2, which provides that every place kept or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of 8 & 9 Vict. c. 109, shews that "place" should be confined to something in the nature of a house, and that the section cannot properly be applied to an inclosure open to the sky. But the words "taken and deemed" are usually employed to indicate that the thing spoken of is not in itself the thing which, for the purposes of attaching to it certain legal incidents, it is to be deemed to be.

Then it is said that it is impossible to suppose that the Legislature intended to attach the incidents of a common gaming-house to such a place as the Reserved Inclosure. The proper way of ascertaining the intention is by construing the words used, and it cannot be doubted that the Legislature

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

intended to attach those incidents to any place within the meaning of the Act, including the cases of uncovered places in towns already referred to.

Of course, in determining the meaning of the word "place," s. 2 may be looked at as well as any other part of the Act. But, whatever validity such an argument might have in the case of an entire racecourse, which may extend over many acres and be resorted to by thousands or tens of thousands of persons who never bet at all, and many, and indeed most, of whom may never come into contact with a bookmaker at all, it cannot outweigh the reasons for considering as a place within the Act the Reserved Inclosure which contains on an average not less than one bookmaker out of every ten persons resorting to it, whilst the greater number of the persons not bookmakers go there for the purpose of backing horses with bookmakers. Places which are not houses or rooms may under the provisions of 8 & 9 Vict. c. 109 itself be gaming-houses: see ss. 2, 4, 6.

Sects. 11 and 12 of the principal Act under discussion shew that it was the deliberate intention of the Legislature to apply the main provisions of the Gaming Act to places within the Act, and, if, as is extremely unlikely, these sections, which are in the main intended, as are the corresponding sections in the Gaming Act, to procure evidence in cases of suspicion, were to be put in force in a case like that of the Reserved Inclosure, the minority who attend without any intention of betting would only have themselves to thank for any resulting inconvenience occasioned to them.

(3.) It is said that the Act was not intended to apply to betting on racecourses at all. If by this is meant only that ordinary betting, whether between persons who are not professional betting-men, or between professional betting-men who in no way attach themselves to a place for the purpose of betting with those who resort thereto, it is apparently true, not only of racecourses, but of all other parts of the country. But then the objection has no reference to the state of facts on which the Court is called upon to adjudicate.

If however it means that every sort of betting is permissible,

provided only that it takes place on a racecourse, the objection plainly goes too far. The enacting part of the Act contains no reference, direct or indirect, to racecourses at all. It would seem to be impossible to contend successfully that the defendant company might lawfully permit a house, room, or office on the racecourse to be used by a bookmaker for purposes forbidden by the Act, though apparently there would be no reason why they should not have done so if the Act had not been passed; or, again, that a bookmaker might take up his stand at a place on a racecourse outside an inclosure, and there carry on his business without moving from the spot, though probably such a practice prevailed at the passing of the Act, and had done so ever since bookmakers came into existence as a class.

When once it appears that the Act is applicable in some cases to owners and occupiers of racecourses as well as to other owners and occupiers, the contention becomes one for a partial exception only, that is to say, an exception of inclosures for betting purposes, which is certainly a difficult one to support, and could not be made out, unless there can be shewn to be a material distinction between them and other parts of racecourses.

The title and preamble of the Act have mainly been relied upon for this purpose. The title may be dealt with shortly. With reference to Acts passed as this was before 1854, when the practice of the House of Commons was altered by Standing Order 34, which for the first time authorized the House in Committee to amend the title, there is a great preponderance of authority in favour of the proposition that the title forms no part of the Act, and cannot even be looked at for the purpose of construing the Act. (See Maxwell on Statutes, 2nd ed. pp. 50, 51, and cases there cited.) But this question need not be gone into further, because in the present case it is quite plain that the Act is not confined to the purpose indicated by the title. The preamble no doubt stands on a different footing, since it does form part of the Act. But there are numerous instances in which the enacting clauses have gone, upon their true construction, beyond the scope of the preamble, and yet have not been controlled by it, and the true rule seems to be that the

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

preamble cannot be resorted to for the purpose of controlling the enacting clauses, either by restricting the scope of them, or by enlarging it, and cannot be relied upon, unless it be in itself clear and precise in meaning, and there is some ambiguity in the enacting clauses themselves which may be cleared up by it. Of course cases will arise where it may be difficult to determine whether the enacting clauses do or do not present such an ambiguity as to require or admit the explanatory operation of the preamble, but the above examination of the enacting part of the Act seems to shew that independently of the preamble there could be no reasonable doubt as to the construction. Even if it be admissible, great care is required in drawing conclusions from it.

The recital is, "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies," and then follow the words "for the suppression thereof be it enacted, &c."

Now it is clear that the enacting clauses do go beyond the preamble in many particulars of importance, e.g. by including within the prohibition of the statute some places which are not houses or offices, and also by including houses, offices, and places where money is received in advance not by or on behalf of the owners or occupiers, but by persons using the houses, &c., and also by including the receipt by any of the same persons not only of money, but also of any valuable thing, and also by extending their (i.e. the owners' or occupiers') promises to pay money to promises by any of the aforesaid persons to give any valuable thing, or to secure the paying or giving by some other person of any money or valuable thing.

There can be no doubt that these extensions of the operation of the Act, all of which are to be found in s. 1, are intentional and deliberate, and could not be affected or controlled by the preamble, though it mentions none of them. Why, then, should it be held that the equally plain enactment of the same

section, whereby every house, office, room, or place opened, kept, or used for the purposes mentioned, or any of them, is declared to be a common nuisance, and contrary to law, is subject to the exception of places, whether on a racecourse or elsewhere, which had been for a considerable time so opened, kept, or used? No doubt this preamble mentions that a kind of gaming had of late sprung up. These words, however, would be sufficiently satisfied by the great and notorious increase shortly before the passing of the Act of the kind of gaming referred to, without its being necessary to interpret them as asserting that it had not previously been known.

But, even assuming that no betting houses or offices had existed otherwise than within the vague period covered by the words "of late," which would be a very strong assumption to make, if we are also to assume that the same kind of gaming had been openly and notoriously carried on in racecourse inclosures for more than half a century, it would be going far beyond the principle which has hitherto been applied to the control by the preamble of the enacting clause, if it were held that places which otherwise would fall within the enacting clauses are to be excepted, because they have long been opened, kept, or used for the forbidden purposes.

The defendants rely upon a statement introduced at the end of the particulars to the effect that the description of the betting carried on in the Reserved Inclosure applies not only to that inclosure. It is there said that at the time of the passing of the Act of 1853 such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century. This statement requires careful consideration before it can safely be acted upon. The first observation that occurs upon it is that it is a wholly one-sided one in the sense that it deals with racecourse inclosures only, and not with other places at all; in other words, it affords no means of judging how far the practice there was exceptional. It gives no information as to the practice of bookmakers outside the inclosure. It would be a singular thing if, long before the

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

passing of the Act, and indeed from an early period after they came into existence as a class, bookmakers did not do what they certainly were doing notwithstanding the Act very soon after its passing, as appears by reported cases, namely, appropriate on the racecourse places where they could carry on their business. If they were so doing, the only distinction that could be suggested between inclosures and other places on racecourses appropriated by bookmakers would be that in the former the betting would be more concentrated and the bookmakers more easy to find. The reasonable inference seems to be that inclosures were used to supply a felt want for a more convenient place for the bookmakers to carry on their already established business in, and thereby to make a profit to the owners, rather than that they preceded and afforded the example for the business of betting in outside places on the racecourses.

Taking the words "since the beginning of the present century" literally and according to their primary meaning, and contrasting them with the words "ever since" which occur immediately afterwards, they do not necessarily involve a statement that the practice began with the century, or at any definite time before the commencement of the Act. The omission of the word "ever" may have been intentional, and then the statement becomes as vague with reference to time as the preamble itself of the Act, and no argument can be founded on it. There can be no reason why the parties to the action should not be kept strictly to the statements which they deliberately prepare. If, however, by straining the language the statement is construed as fixing the commencement of the practice referred to as far back as the beginning of the century, the statement so construed entirely differs in its nature from the admissions contained in the particulars as to matters within the knowledge of the parties to the action. It becomes an assertion of fact as to a period far beyond living memory, and the Court has no knowledge of the evidence on which it is founded, and no means of judging as to its accuracy. It would be unfortunate if the decision of an important question of construction were to depend upon a statement which may turn out seriously to exaggerate the length of

time during which the practice referred to had existed before the passing of the Act. It would seem however that, even on the construction last referred to, the statement though accurate would afford no ground for exempting racecourse inclosures from the operation of the Act. The application of it must depend upon the assumption that the promoters of the Act and the members of the Legislature generally knew of the facts contained in the statement relating to such inclosures, and, with that knowledge, intended by the words used in the preamble to exclude them. But, if that knowledge and intention both existed, it is almost impossible to give any sufficient reason why some more direct language was not used in order to make the intention clear. It is quite a common thing for a preamble to contain a statement of the occasion which has led to the necessity for legislation, without exhaustively describing the legislation intended, and that has been already shewn to be the case with reference to this preamble and s. 1 of this Act. Further, if the Legislature had intended to leave unaffected cases in which the kind of betting struck at had gone on for a long time, the natural thing would have been to limit a time for that purpose, and not to leave so important a question to be determined on the vague phrase "of late sprung up." It could hardly be contended with success that a betting-house otherwise clearly within the Act would escape the operation of it by being shewn to have been opened for forty or fifty years before the passing of the Act, and the same considerations ought to be applied to all places within the meaning of the Act, as there is nothing to make a distinction in this respect between one place and another.

I have thought it better down to this point to confine myself to a consideration of the Act itself, and to express my own individual opinion on the construction of the Act independently of the decided cases, partly because there is no case binding upon this Court, and partly in order to avoid the danger of losing sight of the Act itself in considering the decisions upon it.

These decisions are, however, of great importance, and I now proceed shortly to refer to them. (1.) As to place: there

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

is a remarkable consensus of opinion on this point, when the cases are examined, and in my judgment no single case which, when properly understood, would conflict with the interpretation which I have above suggested. *Doggett* v. *Catterns* (1) has been thought to be a decision that a place under a clump of trees without any mark of appropriation by the betting-man charged cannot be a place within the meaning of the Act. This is shewn by Lindley and Kay L.JJ. in *Liddell* v. *Lofthouse* (2) not to be the case, the decision having turned upon the construction of ss. 4 and 5 of the Act, which last-mentioned section was held not to apply to a man using a place independently of the owner or occupier. In that case not only Erle C.J. and Keating J. in the Court below, but a majority of the judges in the Exchequer Chamber, namely, Pollock C.B., Crompton and Blackburn JJ., and Channell B., thought that the place in question would be a place within the meaning of the Act, if it could have had an owner or occupier. *Snow* v. *Hill* (3), decided by Coleridge C.J. and A. L. Smith J. in 1885, was relied upon both in *Hawke* v. *Dunn* (4), the case against which the appeal is in substance brought, and on this appeal, but there was in that case, so far as the report goes, no evidence of the kind of betting struck at by the Act. For anything that appeared in *Snow* v. *Hill* (3), as reported, the defendant, who did not confine himself to any particular part of the racecourse, but was walking about making bets, may have been not a professional bookmaker betting with persons resorting to the place, but an ordinary member of the public making casual bets. *Shaw* v. *Morley* (5), decided by Kelly C.B. and Martin and Pigott BB. in 1868, was a clear decision that an uncovered place on a racecourse might be an office or place within the meaning of the Act. *Bows* v. *Fenwick* (6), decided by Coleridge C.J. and Brett and Denman JJ. in 1874, was a decision that a place on the Chester Racecourse identified only by a stool and umbrella was a place within the

(1) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(2) [1896] 1 Q. B. 295.
(3) 14 Q. B. D. 588.
(4) [1897] 1 Q. B. 579.
(5) L. R. 3 Ex. 137.
(6) L. R. 9 C. P. 339.

meaning of the Act. *Gallaway* v. *Maries* (1), decided by Grove and Lopes JJ. in 1881, was a case only differing from *Bows* v. *Fenwick* (2) in the fact that the means of identifying the place was a loose box, obviously, I think, an immaterial distinction. *Haigh* v. *Sheffield Town Council* (3), decided by Blackburn, Mellor, and Lush JJ. in 1874, was a case in which a charge was brought against the occupying tenant of a cricket-ground, used, not only for cricket, but for foot-racing, games, and sports, for permitting the user of the inclosure for betting with persons resorting thereto. The evidence shewed that from fifteen to twenty professional bookmakers stood on chairs and stools in different spots calling out the odds, and betting with different persons and receiving deposits. Any one of those bookmakers might within the principles of the cases already cited have been convicted of using the place where they stood for illegal purposes, and the conclusion arrived at by the Court that the defendant, who knowingly permitted such user, was guilty of an offence under the Act, seems to me an inevitable one. In my judgment none of the last three cases referred to can have depended upon the character of the umbrella, box, or stool, and the only way in which the existence of those articles was material was as affording evidence that the bookmaker practically confined himself to a place where he could be readily found. *Eastwood* v. *Miller* (4), relied upon in *Haigh* v. *Sheffield Town Council* (3), was decided by Lush and Archibald JJ. in 1874, and treated a place 3A. 3R. 25P. in area as a place within the meaning of the Act. In that case there are expressions of both the learned judges to the effect that the size of the place cannot be of importance. It is not necessary to rely upon those expressions or to discuss them. The evidence shewed that there were at least two bookmakers betting and receiving deposits, and the fair inference would be that they would so far confine themselves to one spot as to be capable of being found, and that I think would be enough to justify the decision. With regard to

(1) 8 Q. B. D. 275.
(2) L. R. 9 C. P. 339.
(3) L. R. 10 Q. B. 102.
(4) L. R. 9 Q. B. 440.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Rigby L.J.

the Scottish case of *Henretty* v. *Hart* (1), I will only say that I cannot reconcile the reasoning of the two learned judges, Lord Young and the Lord Justice Clerk, with the decision in *Haigh* v. *Sheffield Town Council* (2) before referred to, and that I prefer to rely upon that judgment. I concur more nearly with the reasoning of Lord Craighill, the dissentient judge in *Henretty* v. *Hart*. (1) Finally, the case of *Liddell* v. *Lofthouse* (3), already mentioned and decided by Lindley and Kay L.JJ. in 1896, shews that a place is not less a place within the meaning of the Act because the betting-man using it has not placed any mark of his own upon it.

(2.) As to user: the cases above referred to are authorities also as to user, and I need only refer in addition to decisions as to user in the following cases, which I think important for the decision of the question before the Court. The first is *Reg.* v. *Preedy* (4), decided by Hawkins J. in 1888, in which the learned judge goes through all the authorities and explains the meaning of user in accordance with what I have above indicated. The others are *Hornsby* v. *Raggett* (5), decided by Mathew and A. L. Smith JJ. in 1891, and *McWilliam* v. *Dawson* (6), decided in the same year by the same learned judges, and in which it was held that a man used a tap-room or bar in a public-house for betting, though he did not confine himself to any particular part of it.

(3.) As to the exemption claimed: the only case in which the precise point whether inclosures like the Reserved Inclosure, as distinguished from other places on racecourses, are exempted by implication from the Act is that of *Hawke* v. *Dunn*. (7) I concur in substance with the reasoning of the judges in that case contained in the judgment of Hawkins J. But almost all the cases decided under the Act, and especially all those where bookmakers have been convicted of carrying on their business on racecourses, are directly applicable to inclosures, unless a substantial and material difference between the inclosures and

(1) 13 Rettie, Court of Justiciary Cases, 4th Series, 9.
(2) L. R. 10 Q. B. 102.
(3) [1896] 1 Q. B. 295.
(4) 17 Cox, 433.
(5) [1892] 1 Q. B. 20.
(6) (1891) 56 J. P. 182.
(7) [1897] 1 Q. B. 579.

other ascertained places on racecourses can be made out. Though the preamble has been frequently referred to, it has never seemed to occur to any one concerned that it made the length of time during which the practice charged has been carried on in any way relevant.

On the above considerations I have arrived at the conclusion that the Reserved Inclosure is a place within the meaning of the Act, that it is permitted to be used by the defendant company for purposes forbidden by the Act, and that the plaintiff as a shareholder is entitled to the injunction asked for. The result would be according to my individual opinion that the appeal should be dismissed.

CHITTY L.J. After the exhaustive judgments which have been delivered, little remains for me beyond expressing my own opinion. The facts have been fully stated; the Act of Parliament has been examined closely; its provisions have been stated, analyzed, discussed, criticised, and considered. For myself I have gone through a similar course of investigation. What I propose to do is to deal only with the more salient points and to state the conclusion at which I have arrived.

The case was heard by the Lord Chief Justice on the admissions contained in the particulars and also on the additional admission made at the bar, the just inference from which appears to be that which the Chief Justice was prepared to draw, namely, that the defendants knowingly and wilfully permit the Reserved Inclosure to be used for the purposes for which it is actually used. The correctness of the admissions was not in any way called in question before the Chief Justice. They could not be questioned, nor were they questioned, on the argument before us. It is satisfactory to know that Mr. Asquith was instructed to say, and did say in his opening before the Chief Justice, that, after a careful investigation, the facts stated in the particulars may be assumed to be correctly stated. He said that the sole object of the action, so far as he was instructed, was to obtain the decision of the highest Court in the country upon what is undoubtedly a very important question of law. The question really is a mixed

C.A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Chitty L.J.

question of fact and law. It appears to be this: Is the Reserved Inclosure described in the particulars, and used for the purposes therein stated on the days when the races are held, "a place" within the prohibition of the Act of 1853? The two points, (1.) the nature of the place, and (2.) the nature of the user, although properly made the subject of separate consideration, must in the result be dealt with together in combination in order to arrive at a just conclusion. It appears to me to be incorrect to ask whether the inclosure is excluded; the right question is whether it is included. As the statute creates a criminal offence, it is incumbent on those who allege that the offence has been committed to shew affirmatively that it has been committed. I am not here relying on the old rule that penal statutes ought to be construed strictly: I think that all statutes ought to be construed reasonably. But at the same time I think that the Judicature ought to be on its guard against holding that certain acts are a criminal offence against a statute, unless it is reasonably plain that those acts do amount to the offence within the meaning of the Legislature as disclosed by the statute itself and such surrounding circumstances as are properly admissible in evidence.

The state of the law when the Act of 1853 was passed was this. The Legislature had before it in 1845 the question of betting. By the Act then passed it deliberately refrained from declaring betting illegal; it contented itself with making the contract of betting void, and taking away any right of action to recover a bet lost. The law stood thus when the Act of 1853 was passed: it was lawful for a man to bet, to bet habitually and systematically, and to carry on a business of betting whether on credit or by way of deposit; there was no difference in law between making a single or occasional bet, and being a professional bookmaker. The law as to betting was not altered by the Act of 1853 except only by the special prohibitions contained in that statute. On that statute it is plain that betting of itself is not made illegal. Betting or not betting, a man must be in some place; and it is clear that the word "place" in that Act has not the general meaning of any

or every place. Some particular kind of place is aimed at: what that is must be discovered from the statute itself. It is plain on the statute that the persons, not being the bookmakers, who resort to the "place" are not liable to the penalties of fine and imprisonment imposed by the Act: but they are liable to what may be justly described as the degradation of being arrested and searched, and taken before a magistrate. Consequently, if the plaintiff's contention be right, all persons who are found in this inclosure during the races, or, at all events, while the betting as described is going on, are liable to this treatment although they are present for the mere purpose of seeing the races, or their friends and acquaintances, and have no thought of making a bet. I am unable to think that this point is disposed of by saying that before the betting begins they may safely remain, but that directly it begins they must go, or submit to the risk of being molested by the police.

Coming a little more closely to the language of the statute, I pass by the title, on which I will place no reliance. It appears to me that no argument could be founded on the title, which is not more plainly indicated by the preamble. Here we come to the old question of what is the true relation of the preamble to the enactments themselves. Undoubtedly it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But it has been well said that the preamble is a key to the statute, and that it affords a clue to the scope of the Act; these statements, however, are subordinate to the settled rule above referred to. The contest and the difficulty arise directly you begin to apply these rules to the particular statute. The effect of the preamble must vary according to the greater or less ambiguity of the enacting words, and the distinctive language of the preamble itself. Two things, I think, are clear on the interpretation of this statute: first, the preamble states in unambiguous language the principal mischief for the suppression of which the Act was passed; and, secondly, the word "place" in the enactments is not used in its most comprehensive sense, and is to that extent, at all events, ambiguous. Now I refer to one point in the preamble.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Chitty L.J.

It shews that the kind of gaming intended to be suppressed was a kind which had then lately sprung up. I read the words "of late" in the preamble as referring to something which had sprung up during the eight years' interval after 1845, when the Legislature had considered the question of betting; but whether this be so or not, it is impossible to read the words as relating to a practice which had been going on since the beginning of the century at all racecourse inclosures. Here the fact stated in the tenth clause of the particulars is of great importance. The practice of the bookmakers and the betting transactions of the same character as those which take place in this Reserved Inclosure had been carried on in similar inclosures throughout the country from the beginning of the century, not secretly but openly and habitually. It is inconceivable that these practices, notorious as they must have been, should have been unknown to the Legislature when they passed the Act of 1853, and it is difficult to suppose that, if they had intended to suppress them, some direct and unmistakable words relating to them should not have been found in the Act: yet there are no such words. It is just worthy of mention that, although the Act has been in operation for nearly forty-four years, it is only recently that a suggestion has been made that these practices in the racecourse inclosures are illegal, and render the inclosures themselves prohibited places. During this long period the informers, an alert race, have been asleep, the magistrates somnolent, and the police supine, if this recent suggestion be well founded. But, of course, this is but a mere observation, and affords no answer to the charge if the recent discovery is a real discovery of the true intention of the Legislature.

Lindley L.J. has already given a careful analysis of the Act. I think it correct, and shall not repeat it. The Act contains no definition of the word "place": the absence of any such definition I take to be intentional. The Legislature meant, in my opinion, each case to be dealt with on its own facts, and it seems to me that we ought not to attempt to define what the Legislature has purposely left undefined. The enactments certainly go beyond the preamble. The view I take is this: the Legislature, having before it the leading idea of suppressing

the opening of betting houses or offices, and the receiving of money in advance by the owners of such houses or offices, or by other persons acting on their behalf, foresaw the necessity of employing in the enactments other words which would prevent evasion and subterfuges, and has framed the enactments accordingly: see the judgment of Lush J. in *Haigh* v. *Sheffield Town Council*. (1) But after careful examination of the sections, I am unable to find any sufficiently disclosed intention to enlarge the general ambit of the Act. The business of a bookmaker is not prohibited; by itself it is still lawful; dropping for the moment, but not forgetting, the amplifying words, the gist of the offence aimed at appears to me to be the using of a house, room, or office, or other place as presently explained for the purpose of betting with persons resorting thereto. In the enactments the general and ambiguous word "place" is always preceded by the words "house, office, room," or "house, room, office"; it has sometimes the word "other" prefixed and sometimes not. Nothing turns on the omission of the word "other" where that omission occurs. The leading idea, and the standard description, are to be found in the words "house," "room," and "office"; the place is something of the same kind taken in connection with the user. The ordinary rule of construction sometimes called "ejusdem generis" sometimes "noscitur a sociis" applies. "Place" must mean something of the same kind; something which conforms to the leading idea conveyed by the words with which it is associated. Plainly the inclosure is not a "house" nor a "room" nor an "office." The word "office" in this connection appears to me to have the most comprehensive meaning and the largest import of the three unambiguous words. What are the characteristics, the usual fittings-up, or accessories of an office? A desk, a table, a chair, and things of that description. Now in this inclosure the bookmakers have no apparatus of that kind. There are certain structures which, in my opinion, fall within the Act wherever set up or found; a booth, a tent, and an umbrella fixed in the ground by a spike, which is but a kind of

(1) L. R. 10 Q. B. 102, at p. 109.

C. A. 1897

POWELL v. KEMPTON PARK RACECOURSE COMPANY.

Chitty L.J.

tent, are all within the meaning of "place" when it is used for the purposes indicated. A movable structure on wheels such as those in which merchants conduct their business of loading and unloading at Liverpool mentioned by Martin B. in *Shaw* v. *Morley* (1) is a good example of an office or place within the Act. The fact of such an office or place being set up and used by the bookmaker on a racecourse would not take it out of the Act; a racecourse is nowhere mentioned in it. Now it was pressed upon us by Mr. Asquith in his able argument that the bookmakers do in fact use this inclosure as the place where they separately carry on their betting businesses as described in the particulars. But the question is whether they use the inclosure as a betting house, room, or office, or as a place conformable to the leading idea conveyed by the three standard words. I think that they do not. The inclosure is visited by 2000 persons on attractive race-days, of whom 200 are bookmakers. The bookmakers and their clerks, and the general public are all admitted to the inclosure without distinction and on the same terms. Many of the general public bet with the bookmakers. Some do not bet with them or at all; they go merely to see the races or to meet their friends and acquaintances. The bookmakers have no special right or privilege within the inclosure; no particular part of the inclosure is assigned or allotted to them. They carry on their betting in competition. Although each bookmaker may generally be found near the same place, he has no special right to the place he occupies temporarily; if he moves from it, as he does, any member of the general public may take the place he has quitted. He has no fixed or ascertained place within the inclosure; he cannot claim any particular station. He has no individual control over the place he occupies beyond such as every one else within the inclosure has over the place he occupies for the time being. The term "spot" was employed in the argument; I discard the word altogether: it is not found in the statute.

Some of the principal authorities have already been stated and dealt with at length. I shall confine myself to expressing my opinion upon them. No doubt there has been considerable

(1) L. R. 3 Ex. 137, at p. 140.

difference in the judicial opinions expressed on the construction of this Act. The Act is so drawn as almost to invite difference of opinion—certainly so as to give rise to it. I think that the following cases were rightly decided, namely, *Shaw* v. *Morley* (1); *Bows* v. *Fenwick* (2), and *Snow* v. *Hill*. (3) From *Doggett* v. *Catterns* (4), in which there was much divergence of opinion, I am unable to obtain any safe guidance. I think that *Eastwood* v. *Miller* (5) and *Haigh* v. *Sheffield Town Council* (6) carried the statute beyond its true limit. I am prepared to go as far as *Bows* v. *Fenwick* (2), the case of the umbrella with a spike. Possibly *Gallaway* v. *Maries* (7), the case of the box (simply), may be supported on the same ground, but it is open to question. I concur with A. L. Smith L.J. in what he has said about the opinions of eight judges. Their method of reasoning on the statute is inconsistent with the decision in *Hawke* v. *Dunn*. (8) My conclusion is that the construction put upon the Act by the plaintiff's counsel does not give the proper effect to the dominant words, "house, room, or office"; and, further, I am satisfied that the Legislature has not manifested in the enacting part of the Act a clear intention of declaring illegal such an inclosure as this is and used as it is used.

For the above reasons I think that the appeal ought to be allowed; and for the same reasons that the decision in *Hawke* v. *Dunn* (8) ought to be overruled.

Appeal allowed.

Solicitors for plaintiff: *Le Brasseur & Oakley.*

Solicitors for defendants: *Peachey & Son for Arthur Cheese.*

(1) L. R. 3 Ex. 137.
(2) L. R. 9 C. P. 339.
(3) 14 Q. B. D. 588.
(4) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(5) L. R. 9 Q. B. 440.
(6) L. R. 10 Q. B. 102.
(7) 8 Q. B. D. 275.
(8) [1897] 1 Q. B. 579.

E. L.

1897
July 3.

HUNT *v.* HUNT.

Husband and Wife—Separation by Agreement—Covenant not to Molest—Taking Divorce Proceedings in Foreign Country.

A husband living apart from his wife under a separation deed took proceedings with the view of obtaining a divorce in the courts of Texas, where he had gone for that purpose, and served notice of those proceedings upon his wife residing in England. He did not shew any reasonable ground for taking them:—

Held, that he had committed a breach of his covenant in the separation deed not to molest his wife.

ACTION tried before Wright J. without a jury.

The plaintiff, a married woman, claimed against the defendant, her husband, damages for breach of a covenant not to molest her contained in a separation deed, and an injunction to restrain him from continuing or prosecuting certain proceedings to obtain a divorce commenced by him in the District Court of El Paso in the State of Texas in the United States of America.

The following facts were proved or admitted at the trial: The plaintiff and defendant were married in Ireland in 1868. In 1880 the plaintiff had commenced proceedings against the defendant to obtain a judicial separation. That action was compromised, and on November 24, 1880, a separation deed was executed containing a covenant by the defendant that "notwithstanding her coverture the said Emily Anne Hunt may reside and live separate and apart from him the said Percival John Hunt and free from his control and interference, and that he will not hereafter by any means whatsoever seek to compel the said Emily Anne Hunt to live with him, and will not in any way molest her, or institute any legal proceedings to compel her cohabitation with him." There was also a similar covenant by the plaintiff not to molest her husband. Since the execution of the deed the plaintiff and the defendant have continued to live apart.

In the latter part of the year 1896 the defendant went to Texas, and shortly after his arrival there he filed a statement in the District Court of El Paso county in the State of Texas

setting forth that he was a resident of the same county and state; that he anticipated instituting a suit in that court against his wife Emily Anne Hunt for a dissolution of their marriage on the ground that she, without cause, deserted and abandoned him in October, 1880, and had continued so to abandon and to live apart from him, and stating that he desired to take the depositions of certain witnesses in England for the purpose of perpetuating their testimony and using it upon the trial of the suit which he anticipated instituting. The defendant also prayed that a copy of the statement might be issued by the court to be served upon the plaintiff in England, in order that the defendant might take out the necessary process to secure the depositions of his witnesses. The District Court of El Paso, on December 5, 1896, issued to the defendant a certified copy of his statement with a notice by the clerk of the court annexed thereto, and addressed to the plaintiff, informing her that, after service of the statement and notice upon her, the defendant would apply to the clerk of the District Court for commissions to take the depositions of the witnesses named in his statement.

On December 21, 1896, the copy of the defendant's statement with the above notice annexed to it were served upon the plaintiff at her residence in England by a solicitor acting on behalf of the defendant. The solicitor asked her if she would sign a consent to receive service by post of the proceedings in the District Court of El Paso. This she declined to do, and subsequently brought this action. Her evidence was that she had been worried and anxious, and had suffered in health, by reason of the service of the proceedings upon her, and had incurred costs, amounting to 15*l.*, in obtaining legal advice, and otherwise in relation to the matter.

On an appeal by the defendant from an order for an interim injunction made against him by Wills J., the Court of Appeal made an order for an injunction restraining the defendant, his agents and servants, until after the trial, "from doing any act or taking any proceeding in this country for continuing or prosecuting the proceedings commenced by him, or any similar future proceedings, in the District Court of

1897

HUNT v. HUNT.

El Paso against the plaintiff for dissolution of the marriage contracted between the plaintiff and the defendant."

The defendant counter-claimed for damages for breach of the plaintiff's covenant not to molest him contained in the separation deed, the molestation alleged being the bringing of this action against him.

Herbert Jacobs (*T. E. Haydon* with him), for the plaintiff. The question whether the defendant has molested the plaintiff is one of fact. On the facts he has molested her. He cannot suggest any good cause for taking divorce proceedings in Texas. The wife is entitled to be sued in the courts of this country. The effect of serving notice of the proceedings upon her is that she must either go to Texas in order to defend herself, or must submit to have a decree of divorce made against her there. Her alleged desertion of him took place before the execution of the separation deed, and he is estopped by that deed from setting up that she has deserted him. As to the counter-claim, the wife in bringing this action is only asserting her legal right under the deed, and that cannot be molestation by her.

The defendant in person. Giving notice of my intention at some future time to take proceedings against my wife in Texas for a divorce is not molestation. I am resident at El Paso, Texas, and practising there as a doctor, and therefore I take the proceedings there. There must be an intention to molest in order to constitute molestation, and there was no such intention in this case.

[The following cases were referred to: *Thomas* v. *Everard* (1); *Hunt* v. *Hunt* (2); *Fearon* v. *Earl of Aylesford* (3); *Hunt* v. *Hunt*. (4)]

WRIGHT J. This case certainly presents some difficulty, because it would not be a breach of any covenant in the deed if one of the parties to it, having sufficient cause, took proceedings against the other for a divorce. I think that a covenant which prohibited such proceedings being taken, where there was

(1) (1861) 6 H. & N. 448.
(2) (1861) 4 D. F. & J. 221.
(3) (1884) 14 Q. B. D. 792.
(4) (1884) 28 Ch. D. 606.

sufficient cause, might be held to be against public policy. There is, however, no covenant which goes that length in this deed. The question I have to decide is whether it was unjustifiable and vexatious for the defendant to take proceedings for a divorce in Texas. Now, he does not allege in his pleading, nor has he come here prepared to shew, any merits in those proceedings. I am inclined to think he ought to have come prepared to shew that he has merits. It seems to me, primâ facie, vexatious and unreasonable, in the case of people who are both British subjects and whose marriage was an English marriage, that one should take proceedings abroad for a divorce. The result in this case would be to make it absolutely necessary for the plaintiff either to go out at a great expense to Texas in order to defend herself, or to allow the defendant's proceedings to go against her, and be subject to the slur of being a divorced woman, and, in this country at any rate, it is a slur. I think, therefore, that what the defendant has done is, primâ facie, unjustifiable and vexatious, because the effect of serving the notice upon her must be to bring to her mind the consequences which would follow if she were divorced in Texas, and to compel her to incur great expense in defending herself. I am inclined to think that the defendant went to Texas for the very purpose of taking these divorce proceedings. He filed his statement there very soon after his arrival with a view to taking them. I think he selected a distant place in which to take them for the reason that it would be very difficult and expensive for his wife to resist them. The interim injunction granted by the Court of Appeal must be continued. The plaintiff is entitled to the reasonable expenses she has incurred, and I give judgment for her for 15*l.* damages. I give judgment also for her on the counter-claim, because I have held that she was justified in bringing this action.

Judgment for plaintiff accordingly.

Solicitor for plaintiff: *J. F. Rowe.*

W. A.

1897
July 9.

THE QUEEN *v.* THORNTON AND ANOTHER, JUSTICES. *Ex parte* LACON & CO.

Licensing Acts—Licence—"Off-Licence"—Order sanctioning Removal—Notice of Application—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

The provisions of s. 50 of the Licensing Act, 1872, requiring notice to be given of an application for an order sanctioning the removal of a licence, apply to licences to sell liquor for consumption off the premises.

Therefore, where justices made an order sanctioning the removal of an off-licence from one house to another, without the notice required by that section having been given :—

Held, that the order was invalid, and a certiorari to quash it granted.

AN order nisi had been granted for a writ of certiorari to bring up and quash an order made by licensing justices, granting a licence to one Laceby, in respect of No. 2, Abercrombie Street, Battersea, for the sale of beer, wine, and spirits, to be consumed off the premises. The licence was granted to Laceby, subject to the condition of his giving up a licence which he held in respect of the adjoining premises, called the Five Alls. The questions arose, whether, under the circumstances stated in the affidavits, the order made by the justices was, in fact, an order sanctioning the removal of a licence, within the meaning of the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 50 (1), and,

(1) 35 & 36 Vict. c. 94, s. 50: "Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following :—

"The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorized to grant new licences in the licensing district in which the premises are situated to which the licence is to be removed.

"Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence.

"A copy of the notice shall be personally served upon, or sent by registered letter to, the owner of the premises from which the licence is to be

1897

REG. v. THORNTON. LACON & CO., *Ex parte.*

whether the provisions of that section applied to the case of a licence for the sale of liquor to be consumed off the premises. The notice of the intended application referred to in s. 50 had not been given. The order nisi for the writ of certiorari had been obtained on the application of Messrs. Lacon & Co., brewers, who had purchased the lease of the Five Alls.

Avory, for the justices, and *J. C. Earle* (*Dickens, Q.C.*, with him), for Laceby, the licensee, shewed cause. The order of the justices is not an order sanctioning removal, but a grant of a new licence. Even if it is an order sanctioning removal, the provisions of s. 50 of the Licensing Act, 1872, relating to notice of the intended application, do not apply to the present case, for the licence here in question is what is known as an "off-licence," that is, a licence to sell liquor for consumption off the premises. The last clause of s. 50 of the Licensing Act, 1872, makes confirmation by the confirming authority a condition precedent to all orders sanctioning removal, but s. 24 of the Licensing Act, 1874, expressly exempts off-licences from the necessity for confirmation. This shews that it was not intended that s. 50 of the Act of 1872 should apply in the case of any such licence.

Lawson Walton, Q.C. (*Bodkin* and *Travers Humphreys* with him), for Messrs. Lacon & Co., the owners of the Five Alls, in support of the order nisi. The provisions of s. 50

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removed, and the holder of the licence, unless he is also the applicant.

"The justices to whom the application is made shall not make an order sanctioning such removal, unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal.

"Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences; but no such order shall be valid unless confirmed by the confirming authority of the licensing district."

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 24, "A licence to sell any intoxicating liquor for consumption only off the premises shall not require confirmation by any authority."

1897

REG. v. THORNTON. LACON & Co., *Ex parte.*

of the Act of 1872, with the exception of the last provision, which is expressly excluded in the case of off-licences by s. 24 of the Act of 1874, apply to the present case. Until the passing of the Act of 1874 all the provisions of s. 50 of the Act of 1872 applied, and, in order to exclude the necessity for confirmation in the case of off-licences, it was found necessary to enact s. 24 of the Act of 1874. The protection afforded by the provisions requiring notice is as necessary in the case of an off-licence as in the case of a licence to sell liquor for consumption on the premises.

CAVE J. (after dealing with the facts stated in the affidavits, and deciding that the order of the justices did, in fact, amount to an order sanctioning the removal of a licence). The order of the justices was made without notice of the intended application having been given in the manner required by s. 50 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). It follows that, if s. 50 applies in the case of an off-licence, the order is invalid. I am of opinion that the section does so apply. It has been contended that s. 50 does not now apply in the case of an off-licence, because it provides, in the last clause, that "no such order shall be valid unless confirmed by the confirming authority of the licensing district," while by s. 24 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "A licence to sell any intoxicating liquor for consumption only off the premises shall not require confirmation by any authority." I am of opinion that the very fact of s. 24 of the Act of 1874 having been enacted goes to shew that an off-licence comes within the provisions of s. 50 of the Act of 1872, for there would have been no necessity to provide that an off-licence should not require confirmation, if the provision relating to confirmation had not applied to such a licence. It seems obvious that, at the time when s. 24 of the Act of 1874 was passed, on-licences and off-licences both required confirmation, because they were both within the provisions of s. 50 of the Act of 1872. Sect. 24 of the Act of 1874 has got rid of the necessity for confirmation in the case of an off-licence, but the remainder of s. 50 of the Act of 1872 still applies in the case of an off-licence, and there-

fore the notice required by that section should have been given. The order nisi for a certiorari must be made absolute.

RIDLEY J. concurred.

Order absolute.

1897

REG. *v.* THORNTON. LACON & Co., *Ex parte.*

Solicitors for justices: *Corsellis, Mossop & Berney.*
Solicitors for licensee: *W. W. Young & Son.*
Solicitor for prosecutors: *Wellington Taylor.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1897
July 15.

SMALL AND OTHERS *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

Insurance, Marine—Perils of the Sea—Barratry of Master—Mortgagee of Ship.

Upon an advance of money to enable the borrower to carry out an arrangement by which he was to become part-owner of a ship, and to be appointed her captain, which arrangement was afterwards carried out, it was agreed that the advance should be secured by a mortgage of his shares in the ship, and that he should cause an insurance to be effected on the ship to cover the mortgagee's interest. An insurance was effected, upon the instructions of the mortgagor and the co-owners of the ship, by the ship's husbands as well in their own names as for and in the name or names of all and every other person or persons to whom the same should appertain in part, or in all, against, among other things, perils of the sea and barratry of the master and mariners. It being alleged by way of defence to an action upon the policy of insurance by the executors of the mortgagee that the ship had been wilfully cast away by her captain, the mortgagor:—

Held, upon the argument of a preliminary question in the action, that, assuming the ship to have been so cast away, the mortgagee was nevertheless entitled to recover upon the policy of insurance in respect of a loss by perils of the sea, if he had nothing to do with the appointment of the mortgagor as captain; or in respect of a loss by barratry of the master, if he had taken part in his appointment.

APPEAL from the judgment of Mathew J. on a preliminary question raised in an action upon a policy of marine insurance.

The facts are stated in the report of the case in the Court

C. A. 1897

SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

below (1), and it is only necessary to add for the purposes of this report that the insurance effected by Carlsen & Co., the ship's husbands, purported to be "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part, or in all," and that the perils insured against included, among others, perils of the sea and barratry of the master and mariners.

J. A. Hamilton, and *Lord Robert Cecil*, for the defendants. The mortgagee is not to be deemed the owner of the mortgaged shares in the ship: Merchant Shipping Act, 1894, s. 34. The act of the mortgagor who was in possession as owner is not barratrous as against the mortgagee who claims under him, though it is as against the co-owners. It does not appear that Wilkes, the mortgagor, acted as the agent of the mortgagee to procure the insurance of the ship, or that the insurance was upon Small's interest in the ship as mortgagee. The stipulation made by Small's solicitor seems to have been merely that Wilkes should effect an insurance of the ship, the idea being that that insurance would secure Small's interest. Carlsen & Co. insured the ship in the ordinary course of their duty as ship's husbands and as agents for the owners. So that really Small, the mortgagee, was only insured through Wilkes's insurance, and he stood in the same position as if he were an assignee of the policy from Wilkes. Therefore, anything that would constitute a defence to an action on the policy by Wilkes is a defence in the present action. The ship for the purposes of the argument of the preliminary point must be assumed to have been lost through the wilful act of Wilkes; therefore he could not have recovered upon the policy. The mortgagee of shares in a ship stands in such a case as this in no better position than the mortgagor. The case is entirely different from one in which the mortgagee independently insures his own interest separately. The effect of the transaction here was merely that the mortgagor undertook to apply his insurance for the benefit of the mortgagee.

(1) Ante, p. 42.

There was nothing to shew that Small employed Wilkes as captain, as the learned judge below seems to have thought, and his conduct, though it might be barratrous as against the co-owners, was not so against the mortgagee: *Hobbs* v. *Hannam*. (1)

Carver, and *W. E. Lloyd*, for the plaintiffs, were not called upon.

LORD ESHER M.R. In this case the plaintiffs, as the executors of Samuel Small, sue upon a policy of marine insurance. There is no question of any assignment of the policy. The plaintiffs sue on the footing that Small was a party to the policy. It cannot be disputed in my opinion that, if this ship had been lost in a storm, and not by the wilful act of the captain, Small could have recovered upon the policy to the extent of his interest, which had been insured by his authority and on his behalf. The judge appears to have found that in point of fact by an arrangement between Wilkes and Small the former was to effect an insurance on the ship for and on behalf of Small to cover his interest. It is clear that Small, as the mortgagee of Wilkes's shares in the ship, had an insurable interest to the amount for which the ship was his security. Therefore, Small was insured by this policy against a loss of the ship by perils of the sea or other perils insured against to the extent of his interest as mortgagee. For this purpose the interests of the mortgagor and mortgagee are distinct interests; the mortgagee does not claim his interest through the mortgagor, but by virtue of the mortgage which has given him an interest distinct from that of the mortgagor. If the case rested there, the mortgagee would not be in possession of the ship, and would have nothing to do with sailing her, and the captain and crew would be the captain and crew of the mortgagor and his co-owners only. If, in that state of things, the ship had gone to the bottom, and the mortgagee were suing on the policy made on his behalf and to cover his interest, then, the captain not being his captain, the acts of the captain would, so far as he was concerned, be the acts of a stranger. If a stranger had done something wrong to the ship by reason of

(1) (1811) 3 Camp. 93.

C. A. 1897

SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

Lord Esher M.R.

which the sea had got into the ship, and she had been sent to the bottom, then by insurance law that would be a loss by perils of the sea, the proximate cause of the loss being such a peril. Therefore, in that case, the mortgagee would not be affected by the wrongful act of the captain, who would be a stranger to him; and he would recover, not for a loss by barratry, but for a loss by perils of the sea. But, on the other hand, if the captain were the captain of the mortgagee, then he would be guilty of such misconduct towards the person who employed him as is called barratry. In this case the judge has found that, before the policy was effected, Small had entered into an arrangement with Wilkes by which he was to find the money required, and take a mortgage of Wilkes's shares in the ship as security, and Wilkes was to be captain of the ship; and he appears to have held that Small took part in placing Wilkes in the position of captain. The consent of the co-owners would, I suppose, be necessary to the arrangement that Wilkes was to be the captain, and I think the inference is that they did consent to it. If that were so, then he was in reality the captain for the mortgagee and the co-owners. If he were the captain of the mortgagee, then the wrongful act alleged against him would be barratry as against the person who so appointed him captain; and, accordingly, the learned judge below treated the case as one of barratry. In that view of the case, the mortgagee would be covered by the insurance against a loss by barratry of the master. The defendants seem to me to be in this dilemma: If Wilkes was the captain of Small, then Small could have recovered to the extent of his interest for a loss of the ship by barratry; and consequently his executors can do so; if Wilkes was not the captain of Small, then Small could have recovered as for a loss by a peril of the sea, and consequently his executors can do so. On these grounds I think the appeal should be dismissed.

A. L. SMITH L.J. I agree. The plaintiffs sue as the executors of Small on a policy of insurance on ship against a loss by, among other things, perils of the sea and barratry of the captain or crew. The contention set up by the defendants is

that any defence which they would have against an action on the policy by Wilkes they would have also against an action by Wilkes's mortgagee. The assumption must for the present purpose be made that the ship was scuttled by Wilkes, and that the defendants would have a good defence against him. The question is whether that is a defence as against the plaintiffs. If Small was the assignee of the policy from Wilkes, and had to sue as such, then I think that any defence which the defendants would have against Wilkes they would also have against the plaintiffs. But Small was a party entitled to sue on the policy, it having been effected on his behalf in pursuance of an arrangement made between him and Wilkes for securing him in respect of moneys advanced by him to Wilkes. Wilkes wished to get the command of the ship, and had procured two other persons to join with him as co-owners of the ship. He had no money, and he therefore went to Small, his father-in-law, to obtain an advance of the necessary sum by him. The effect of the judge's finding is that Small advanced the requisite sum on condition that Wilkes should be the captain of the ship, and that he was to be secured by a mortgage of Wilkes's shares in the ship and also by the policy. Accordingly a policy was effected in the ordinary form, by which the ship's husbands were declared to be insured as well in their own names as for and in the names of all persons interested. In my judgment Small was entitled to sue on this policy in his own name, and being so entitled, how did the wrongful act of Wilkes affect him? It is suggested that, because the wrongful act of Wilkes would be a defence to an action by him, therefore it is a defence to the plaintiffs' action. But the answer is that Small was entitled to sue on this policy in his own name and on his own account and had nothing to do with Wilkes. His action would be for a loss by perils of the sea, and, the ship having been in fact lost by a peril of the sea, he would have been entitled to recover on the policy and the defendants would have no defence. There is another ground on which the plaintiffs appear to be entitled to recover. I think the learned judge was right in holding upon the evidence that Small had taken part in the appointment of Wilkes as

C. A. 1897

SMALL v. UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION.

captain of the ship. If so, the act of Wilkes was barratrous as against Small just as it was as against the co-owners, and this is a peril insured against. On that footing, too, the loss was covered by the policy. For these reasons I think the appeal should be dismissed.

RIGBY L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Warriner & Co., for Davis & Lloyd, Newport, Mon.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

E. L.

C. A. 1897 *July* 15.

[IN THE COURT OF APPEAL.]

MERSEY DOCKS AND HARBOUR BOARD *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Security for Payment of Annuity—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87, *sub-s.* 2.

Sect. 87, sub-s. 2, of the Stamp Act, 1891, which provides that a security for the payment of any annuity by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid, does not apply to the case of a grant of a perpetual annuity in consideration of a sum of money paid by way of purchase.

APPEAL from the judgment of a Divisional Court (Wills and Grantham JJ.) upon a case stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

The facts and the sections of the Stamp Act, 1891, and those of the Mersey Dock Acts Consolidation Act, 1858, upon which the question in the case depended, are fully stated and set forth in the report of the case in the Court below. (1)

Carver (*Joseph Walton, Q.C.*, with him), for the appellants.

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *Danckwerts*, for the Crown.

(1) [1897] 1 Q. B. 786.

The arguments were to the same effect as in the Court below.

LORD ESHER M.R. I am of opinion that this appeal should be dismissed. In my opinion there is really nothing in the contention for the appellants. It is contended that the grantees of this annuity must be considered as persons who had lent money to the appellants. A loan of money involves the obligation to repay. The answer to the appellants' contention is that the annuitants never lent any money to the appellants, and they never could claim repayment of the money paid by them. This was not the case of a loan of money, but of the purchase of an annuity. That being so, the whole of the argument for the appellants falls to the ground.

A. L. SMITH L.J. I am of the same opinion, and have nothing to add to the judgment of the Master of the Rolls.

RIGBY L.J. I agree. Sect. 87, sub-s. 2, of the Stamp Act, 1891, speaks of a security for the payment of an annuity by way of repayment or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged. The question is whether the language of the section includes any payment of money for which the grant of an annuity is to be the consideration. If so, it would cover every case of a grant of an annuity, which would be quite inconsistent with s. 60 of the Act. It is plain to my mind that, when an annuity such as this is created de novo, whether by grant or by covenant, the transaction is within the meaning of the Act a sale of an annuity, just as it is in popular and certainly in conveyancing language. This annuity is not really paid in order to satisfy or discharge the money advanced to the board, for it is to continue payable for ever unless the board happen to be in a position to redeem it under s. 308 of the Mersey Dock Act. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Rowcliffes, Rawle & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

E. L.

C. A.
1897
June 29.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL AT THE RELATION OF ALFRED HARVEY MOORE AND OTHERS *v.* WRIGHT.

Sea-shore—Foreshore—Tidal and Navigable Waters—Right to fix Moorings as incident to Navigation—Immemorial User to fix Moorings in Foreshore—Presumption of Legal Origin.

An immemorial user of the foreshore in tidal and navigable waters, by the owners of fishing-boats and other craft, by fixing moorings in the soil, for the purpose of attaching their boats to them, may be supported either as an ordinary incident of the navigation of such waters, or on a presumption of a legal origin by grant from the Crown of the foreshore subject to such user, or by concession by a former owner of the foreshore to all persons navigating the waters to use it for fixing moorings.

Such an immemorial user in the River Thames may be supported on the presumption of regulations prescribed by the port authority of the port of London (per Rigby L.J.).

APPEAL from the judgment of Cave J. at the trial of the cause with a jury.

The action was brought in the name of the Attorney-General at the relation of a number of fishermen and yacht-owners, claiming an injunction restraining the defendant from interfering with their moorings, and from casting adrift their craft lying at such moorings, within and on the foreshore at Leigh in the River Thames. The defendant was sub-lessee of a several fishery, and his case was that the digging up of the soil of the foreshore and placing in it baulks of timber or other weighty things for the purpose of attaching thereto chains and buoys for mooring was a trespass which he had a right to abate. He accordingly cut adrift certain of the craft from their moorings, and he took up and removed some of the moorings. The right to navigate the waters and to cast anchor on the foreshore was not disputed. The defendant in his counter-claim asked for a declaration that he was entitled to enjoy the soil free from such rights as were claimed by the plaintiffs. The jury found an immemorial user, by all persons navigating the waters at Leigh, of the foreshore for fixed moorings, and gave their verdict for

the plaintiffs. The learned judge gave judgment in accordance with the verdict of the jury, and granted the injunction prayed.

The defendant appealed.

Witt, Q.C., and *Courthope Munroe*, for the defendant. There can be in law no such right as that claimed by the plaintiffs, which is in effect that all the world may dig up the foreshore and fix moorings on it. It is not disputed that there is a right to cast anchor as a necessary incident of navigation; but the fixing of moorings is not such a necessary incident. There is no such right incident to all the foreshore of England; and the right claimed at this place is too general, for it is claimed for all the world, and not on behalf of any limited body or corporation. The act of digging up the foreshore would be evidence of ownership inconsistent with that of the true owner. It has been suggested that the fixing of moorings is beneficial to the owner of the soil because vessels anchoring elsewhere within the limits of the fishery would do harm to it; but the suggestion has no weight, because the right to moorings does not exclude the right to anchor anywhere, and there has been no abandonment of this latter right.

[They cited Brooke's Abridgment Customs, 46; *Fitch* v. *Rawling* (1); *Blundell* v. *Catterall* (2); *Gann* v. *Free Fishers of Whitstable*. (3)]

Rentoul, Q.C., and *Stuart Moore* (*Edmondson* and *Saunt* with them), for the plaintiffs. If any legal origin can be found for the immemorial user established by the verdict of the jury, it should be presumed. The right may be supported as a general incident of navigation or as applicable to this locality. If it is the former, the user in this case has been reasonable, and does no injury to the owner of the soil, and cannot be objected to. The locality is under the jurisdiction of the Thames Conservancy, who would not have permitted the moorings to be placed there unless the use of them were reasonable. One possible legal origin is that the authority of the port of London appointed moorings at this place as a convenient and suitable

(1) (1795) 2 H. Bl. 394. (2) (1821) 5 B. & A. 268.
(3) (1864) 11 H. L. C. 192.

C. A. 1897

ATTORNEY-GENERAL v. WRIGHT.

mode of anchoring vessels. Other possible legal origins are that the Crown might have granted the right to fix moorings before it parted with the ownership of the soil, or the owner of the soil might have subsequently made the concession. Any one of these considerations would supply a legal origin to the immemorial user found by the jury.

The mooring of ships on the ground adjacent to a port, if it has been so anciently used, without paying anything for it, is mentioned in Hale, de Portibus Maris (Hargrave's Tracts, c. 7, p. 85); and anchorage ground in a port is indicated as having existed at Whitstable in *Free Fishers of Whitstable* v. *Foreman*. (1)

Witt, Q.C., in reply.

LORD ESHER M.R. In this case at a particular part of the River Thames, where it is navigable, fishermen and owners of other vessels have put down moorings to which they attach their vessels. The moorings are fixed and are marked with buoys, and all the person navigating has to do is to slip the attachment when he takes his vessel away, and to pick it up again when he returns to the mooring. These moorings are the property of the person who puts them down—at all events, at the time when they are put down. The defendant is lessee of the foreshore to which the moorings are fixed, and he claims that, though the boat-owners have the right to cast anchor, they have no right to affix anything to his soil, and that it is a trespass to do so which he has a right to abate, and that he has a right to cut adrift any vessel so moored, and either to take or throw away the part of the mooring which was placed in the soil, on the ground that it became the property of the owner of the soil. What is the meaning of a mooring? It is such a mode of anchoring a vessel by means of a fastening in the ground, either an anchor or something heavy, and a chain and buoy, as will allow of the vessel picking up the buoy when she returns to it, and so coming to rest. The owner of the vessel takes possession of his mooring when he returns to it. He does not assume to

(1) (1868) L. R. 3 C. P. 578.

take possession of the land, for he only claims to come back to and use his own mooring, and that no one has the right to remove or destroy the moorings; and I should say that no one has the right to use them in order to anchor his own ship. Now, is that mode of anchoring a ship a common incident of the navigation of ships? It seems to me that it is the duty of judges to bring into force the knowledge that they have in common with all who are engaged in a particular business, and that they should not shut their eyes and affect not to know what everybody conversant with the particular business with which they have to deal knows. In this particular case every one knows who knows anything about navigation that there are two ways of anchoring a ship. There is the temporary anchoring by means of an anchor, which is lifted when necessary, and there is the more permanent mode by means of moorings. For an example of this latter, there is the *Victory* when she lay in Portsmouth Harbour, where she was at moorings. So the yachts in Cowes Roads have moorings, which they take up whenever they return thereto, passing a chain or rope through the ring of the buoy which indicates the mooring. There is, therefore, this mode of bringing a ship to rest and keeping her so for a time, which is within the ordinary course of navigation. This is not a right of any individual: it is a general right to use the waters for navigation in any ordinary way, and to anchor in either of the two well-known ways, either by means of an anchor or of a mooring.

I think such a matter is not to be traced to a grant by the sovereign or the owner of the soil, but that it is a right by the law of England, a public right in every one navigating in navigable waters. If so, the owner of the soil took his rights to the soil subject to those general rights. On that ground alone, it seems to me, the defendant wrongly interfered with the rights of these people; and he is asserting that he intends to continue to do so, and that is the subject-matter of an injunction. But even if this view were wrong, there is another ground which is amply sufficient to support the injunction, and that is, that there may be in regard to this locality a prescription in favour of persons frequenting this place for the purpose of anchoring

C. A. 1897

ATTORNEY-GENERAL v. WRIGHT.

Lord Esher M.R.

their vessels. There was evidence which authorized the presumption of a grant from the Crown, or of a grant from the persons who took under the Crown. In either view, the case was properly left to the jury, who have found that there was immemorial user; and the judgment entered on their finding was right, and must be supported.

A. L. SMITH L.J. It seems to me there are two answers to the points which were made on behalf of the defendant. The case was tried before my brother Cave and a special jury, who found for the plaintiffs, and that the defendant was not justified in doing what he has done. I do not pause to inquire about the pleadings, for the case is shortly that from time immemorial—as the jury have found on evidence that is overwhelming—the fishermen and yacht-owners who are represented in the information by the Attorney-General have been mooring their craft at the place in question, Hadleigh Ray, which is on the left bank of the Thames, beside the town of Leigh, and that they have been mooring their craft, not by casting an anchor therefrom and riding thereto, but by letting down and fixing wooden beams into the soil, which form the anchor which holds the boat, and which, so far as the defendant's fishery is concerned, is obviously more beneficial to the defendant than the casting of anchors on every occasion on which the boat came in. These fishermen and yacht-owners from time immemorial have been using these moorings—using them when they came in, casting adrift therefrom when they went out, and when they came in again, taking up the moorings as before.

The defendant recently has been trying to levy a toll on these moorings, and the fishermen and yacht-owners resisted this toll; so the defendant took the matter into his own hands, and, whilst the craft were lying at their moorings, cut some of them adrift, and said he was justified in so doing. Hence the case came before my brother Cave, and the jury have found their verdict in favour of the plaintiffs. It is not argued that the verdict was wrong on the facts proved; but it is said that in spite of the finding of the jury, and in spite of the immemorial

user proved to exist with regard to this class of mooring at the place in question, there can be no right in law to support the user, and that therefore judgment should have been entered for the defendant.

The defendant is the lessee of the owner of the several fishery opposite to the town of Leigh, who is therefore primâ facie owner of the soil underneath such fishery. Now take it for the purposes of to-day that he is owner of the soil at the locus in quo. Is he absolute owner, or is he owner subject to certain rights? It is beyond all question that he is owner subject to the common law right of all Her Majesty's subjects, and of all frequenting the sea, to pass and repass and navigate over the place in question, and, as incident to that navigation, to anchor in the ordinary mode of navigation.

The first question which arises is whether or not on the evidence in this case the true inference to be drawn by the Court is that this mode of bringing up these craft, the fishing-boats and yachts, is an ordinary incident of the navigation of such craft. If anything were wanted beyond one's own knowledge (which I am entitled to refer to as my lord has stated), there is one thing which seems to me to shew in the strongest possible way that it is the ordinary incident of navigation of such craft as we are dealing with, namely, that they have been brought up with moorings like these from a time from which the memory of man runneth not to the contrary, and that this should always have been done. What inference am I to draw from this? These fishing-boats and these yachts—I know it is said now that the yachts are more numerous than they used to be, but that is nothing to the point—as far back as memory goes have been navigating the place in question by bringing up, when they have wanted to bring up, to these moorings, and I draw the inference from this that is an ordinary incident of navigation. I say certainly here and (if I may use my own knowledge) around the kingdom also, except where the water is deeper, one knows of many places in which this method of anchoring is adopted. The case the defendant made was that the persons represented by the Attorney-General had no right to put any wooden structure or wooden beams into the soil.

C. A. 1897

ATTORNEY-GENERAL v. WRIGHT.

A. L. Smith L.J.

The answer is that the claim to the soil is subject to the ordinary incidents of navigation, to the common law rights which all Her Majesty's subjects and all other persons lawfully navigating have; and, if this be an ordinary incident of navigation, as I think it is, the defendant's case is gone, and he cannot justify the trespass of cutting away these moorings, and letting the craft riding at anchor there adrift on the Thames.

But if this inference which I draw is incorrect, it seems to me there are other grounds upon which the finding of the jury can be supported. When Hadleigh Ray, or this several fishery, or the foreshore, or all three together, were granted by the Crown to the grantee they were granted on the condition that the grantee and his successors in title should ever thereafter occupy and enjoy that land subject to the right of all Her Majesty's subjects passing and repassing and anchoring in this way to this class of wooden anchor in the place in question. It has been held over and over again, and in no case more strongly than in *Goodman* v. *Saltash Corporation* (1), that it is the duty of the Court when they find a user such as this, an uninterrupted and immemorial user of an incident like this, to find if possible a legal origin for it. In the present case this duty is satisfied either by presuming a grant from the Crown in the manner in which I have described, or a grant from the lord of the manor. I have no difficulty in making either presumption. There is a good legal origin in either of these cases. For the reasons I have given I think the appeal of the defendant should be dismissed, and the judgment and verdict should stand.

RIGBY L.J. I am of the same opinion. The main point in this case concerns the interests of the public. The statement made is that the defendant has insisted upon tolls being paid by persons coming in fishing-boats and yachts and other craft for the right to moor in a particular manner, which is described in the evidence, and which consists in having a beam or beams of wood inserted in the soil, and some apparatus for connecting that, by a chain, cable or hawser, with the craft in question.

(1) (1882) 7 App. Cas. 633.

The beam or the mooring—to use the general term—is marked by a buoy with a view to that same vessel returning and using it again. The defendant says that that is an unlawful user of his soil, and he claims by a counter-claim to have a declaration that he is entitled to the right and possession of the foreshore free from any rights of the plaintiffs or any of them to fix permanent moorings to the soil thereof.

Now, what has taken place appears to be this—that on several distinct occasions when yachts were moored to the moorings the defendant has taken up the moorings out of the soil, and set the craft adrift with all the risks attendant on such a proceeding. The evidence, it is admitted, abundantly proves that what the plaintiffs have done is perfectly right, provided that a legal origin can be shewn for the practice which they have followed.

I think there can be no doubt that such a legal origin can be found. Leigh is part of the port of London. During all times within legal memory there has been some authority which has had a right to make regulations for the anchoring of craft within that port, either the Crown or some person who has derived some right from the Crown. I can see not the slightest difficulty in supposing that it was one of the regulations of this part of the port of London that the mooring or anchorage of vessels should be carried out in this manner: by having a fixed structure, a beam or beams of wood, in the soil, and by attaching the vessels to that. If there be one possible legal origin that is enough, and I propose to say nothing about any other, not because I wish to express any doubt as to what has been said by the Master of the Rolls and the Lord Justice, but because I have arrived at that which to my mind is a satisfactory conclusion.

If it be the state of things that, in accordance with regulations which we may presume to have been made at some time, this is the way in which craft of the kind are to be anchored or moored in that part of the port of London, what right has the defendant to interfere with the mooring in any way or at any time? To be sure, he represents the owner of the soil—that is not in question. His argument has been that it is a trespass

C. A. 1897

ATTORNEY-GENERAL v. WRIGHT.

Rigby L.J.

in each and every one of the plaintiffs, or other members of the public, to come there and dig up, or in any way remove, any portion of the soil for the purpose of inserting therein a mooring. Then he goes on to say that because the plaintiffs trespassed upon the soil he cut the boats adrift. I do not say that would be justifiable in any way; but if it were impossible to find that there was a legal origin for this right, he might be entitled to that relief which he claims by the counter-claim—a declaration that he is entitled to enjoy the soil free from any such rights as are set up by the plaintiffs. But he is in no sense a harbour authority; he is in no sense a conservator of the river; it is not for him to go and do what he thinks right and proper in reference to the moorings and anchorage. If anything goes wrong he must go to the proper authority and get it remedied by them. Unless his rights are to exclude the public from inserting their moorings in his soil, he has no right of interference whatever; and therefore I think the plaintiffs and the Attorney-General are entitled in substance to the relief that is granted by this injunction.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *W. F. Saunt.*

Solicitors for defendant: *Ranger, Burton & Frost.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1897
July 19.

EDWARDS *v.* STEEL, YOUNG & CO.

Ship—Seaman—Termination of Service Abroad—"Maintenance and Passage Home"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

By s. 186 of the Merchant Shipping Act, 1894, where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall, among other alternatives, either (*c*) provide him with a passage home, or (*d*) deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home.

Upon the discharge abroad of a British seaman, the consul, acting under clause (*d*), fixed a sum which he deemed sufficient to defray the expenses of the seaman's passage home, and the master deposited this sum with the consul, who provided the seaman with a voucher for a passage. The voucher for the passage did not include maintenance. In an action by the seaman against the shipowners to recover the expenses of his maintenance on the passage:—

Held, that the master, by depositing the sum fixed by the consul, had complied with the requirements of clause (*d*), and the shipowners were not liable:

Semble, a "passage home" in clause (*c*) means a passage to the port at which the seaman was shipped, or to some port in the United Kingdom agreed to by him.

APPEAL from the judgment of Collins J. in favour of the defendants at the trial of the action without a jury. (1)

The action was brought to recover, under s. 186 of the Merchant Shipping Act, 1894 (2), certain expenses incurred by

(1) [1897] 1 Q. B. 712.

(2) 57 & 58 Vict. c. 60, s. 186:—

"(1.) In the following cases, namely,—

"(*b*) Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions;

"(2.) The master shall . . . . besides paying the wages to which the seaman or apprentice is entitled, either

"(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or

C. A. 1897

EDWARDS v. STEEL, YOUNG & CO.

the plaintiff by reason of the master of the defendants' ship, in which the plaintiff was employed as a seaman, having, on the discharge of the plaintiff at a foreign port, wrongfully failed to comply with the provisions of that section.

The plaintiff was a seaman living at West Hartlepool, and he signed articles for a voyage in the British Steamship *Capenor*, belonging to the defendants, from West Hartlepool to Madeira and other places, the plaintiff to be discharged at any port between the Elbe and Brest, or in the United Kingdom, at the master's option. The crew were discharged at Antwerp, and, together with the master of the ship, attended before the consul for the purpose of being paid their wages. According to the facts as found by the learned judge at the trial, the master had a conversation with the consul, when the latter said that the men should be paid if the master would give a guarantee to pay the expenses of their passage home; that the master gave the guarantee required, and took no further part in the matter; and that the consul thereupon arranged with the men to pay off their wages, and to provide them with a passage home, offering to them all a passage to Grimsby, which they all accepted. (3) The men's wages up to the date of their discharge were paid, and the consul allowed such a sum as he considered necessary for the expenses of their passage, and made out and handed to them vouchers for their passage to

"(*b*) furnish the means of sending him back to some such port, or

"(*c*) provide him with a passage home, or

"(*d*) deposit with the consular officer . . . . such a sum of money as is by the officer . . . . deemed sufficient to defray the expenses of his maintenance and passage home."

"(4.) If the master fails, without reasonable cause, to comply with any requirement of this section, the expenses of maintenance or passage home, (*a*) if defrayed by the seaman or apprentice shall be recoverable as wages due to him."

(3) There was a conflict of evidence as to what took place before the consul, the evidence of the plaintiff and another witness being to the effect that the plaintiff requested the master to send him back to West Hartlepool, and to defray the expenses of his maintenance until his arrival there, but the master declined to do more than provide him with an order for a passage without rations to Grimsby. The master's evidence, on the other hand, which the judge believed and the Court of Appeal adopted, was to the effect above stated.

Grimsby. The master subsequently paid to the consul the guaranteed sum. The ship by which the men were conveyed from Antwerp to Grimsby did not sail until the following day, and the passage did not include food. On arriving at Grimsby the plaintiff had to pay his railway fare from that place to West Hartlepool.

The plaintiff's particulars of claim were as follows :—

(1.) Maintenance and lodging at Antwerp from the time of discharge until departure to Grimsby, 10*s*.

(2.) Maintenance on the voyage from Antwerp to Grimsby, 3*s*. 6*d*.

(3.) Train fare from Grimsby to West Hartlepool, 9*s*. 10*d*.

(4.) Wages at the rate of 2*s*. 8*d*. per day, and rations at the rate of 2*s*. 4*d*. per day, from date of discharge until payment or judgment.

Collins J. held that the master had, by paying the sum fixed by the consul, complied with the requirements of s. 186, sub-s. 2, clause (*d*), and that the defendants were not liable. He further held that the passage to Grimsby was a "passage home" within the meaning of clause (*c*). He accordingly gave judgment for the defendants. (1)

Robson, Q.C., and *J. D. A. Johnson*, for the plaintiff. The defendants are liable for the expenses of the plaintiff's maintenance on the voyage to Grimsby. By s. 186, sub-s. 2 (*d*), of the Merchant Shipping Act, 1894, the master must deposit with the consular officer a sum deemed by the latter sufficient for "maintenance and passage home." It is not enough for the master to leave it to the consular officer to settle the amount. The master must see that maintenance is included, and the obligation is not fulfilled by his depositing a sufficient sum for the passage alone. The words "maintenance and passage home" shew that the two things must be provided for by the master. The plaintiff, therefore, is entitled to recover for the expenses of his maintenance on the passage to Grimsby; and the same argument will apply to the expenses of his maintenance at Antwerp between the date of his discharge and his

(1) [1897] 1 Q. B. 712.

C. A. 1897

EDWARDS v. STEEL, YOUNG & CO.

departure for Grimsby. Further, the words "passage home" in clause (*c*) mean a passage to the port at which the seaman was shipped, or to some port in the United Kingdom agreed to by the seaman. The passage to Grimsby, therefore, did not comply with that clause, though, if the plaintiff, as Collins J., found, agreed to go to Grimsby, the point does not arise. The action, however, is a test action, and the parties desire the opinion of the Court upon the section.

Joseph Walton, Q.C., and *Lewis Noad*, for the defendants. The master's obligation under clause (*d*) was to deposit the sum fixed by the consul. The master left the matter in the hands of the consul to arrange. If the consul by some misapprehension fixed a sum which did not include anything for maintenance, the seaman has no remedy. The master has complied with clause (*d*) by paying the sum named by the consul.

LORD ESHER M.R. This is an action by a seaman against shipowners, in whose employment he was, to recover certain expenses which he had incurred. By the agreement between the seaman and his employers the former might have been discharged at any port in the United Kingdom or on the Continent of Europe within certain limits, in which Antwerp was included. He was discharged at Antwerp, and under the contract he was entitled to his wages up to the time of his discharge and to nothing more. The contract then came to an end. But as Antwerp is a port outside Her Majesty's dominions, the Merchant Shipping Act, 1894, has conferred certain rights upon the seaman, which come to him under the Act alone, and which are over and above what he is entitled to under his contract. If there were nothing but the contract, the seaman would have to find his way home from Antwerp. The Act has, however, conferred upon him certain rights and has imposed upon the shipowners certain obligations. By s. 186, sub-s. 1 (*b*), "where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions"—which was the case here—then by sub-s. 2, "the master shall . . . . besides paying the wages to which the seaman or

apprentice is entitled "—that is, the wages due in this case up to the time of his discharge at Antwerp—"either (*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman." If the master adopts this course, then the shipowner will not have to pay the seaman anything beyond the wages due under the contract; he will have fulfilled his obligation under this clause when he has provided the seaman with employment on board another ship as therein specified, and in that case the seaman will get his wages from that other ship. The master, however, has other alternative courses which he may adopt. He may "(*b*) furnish the means of sending him back to some such port." The master would fulfil his obligation under this clause by paying some other ship to take the seaman back, and maintain him during the voyage, or, perhaps, though I doubt whether this would satisfy the requirements of the clause, by giving the seaman sufficient money to enable him to get back. The words "such port" clearly refer to the port mentioned in clause (*a*). The next alternative is, "or (*c*) provide him with a passage home." Collins J. appears to have thought that a "passage home" would include a passage to any port in the United Kingdom. I hardly think that that is the right view. If a seaman were shipped on the Clyde, could a "passage home" mean a passage to London? I incline to think—and I state my opinion on this point, though it is not strictly necessary to decide it, because this is a test action and the parties desire to know the construction which we place upon the statute—that a "passage home" means a passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by the seaman, and that to provide him with a passage includes an obligation to provide him with reasonable maintenance during the passage. In the present case the seaman agreed to go to Grimsby. Then comes clause (*d*), which is another alternative, "or deposit with the consular officer . . . . such a sum of money as is by the officer . . . . deemed sufficient to defray the expenses of his maintenance and passage home." That clause imposes on the

C. A. 1897

EDWARDS v. STEEL, YOUNG & CO.

Lord Esher M.R.

consular officer the duty of determining what sum of money is sufficient to defray the expenses of the seaman's maintenance and passage home. That, in my opinion, makes the consular officer the arbitrator as to the sum to be deposited by the master, and there is no appeal from his decision. If the master has deposited that sum, no claim can be made against the shipowner under the section, and of course no claim can be made against the consular officer. If, therefore, the consular officer has named an insufficient sum, no claim can be made against the shipowner. I desire to say this, that, when a consular officer undertakes to send a seaman home, he ought to name a sum which will cover both the passage home and his maintenance during the voyage. If, therefore, the consular officer estimates nothing for maintenance, he does not do that which is required of him by the statute; but, at the same time, the seaman has no remedy. The shipowner is discharged when the master has done that which clause (*d*) requires of him. This is the view of the section taken by Collins J., and I agree with it.

As regards the claim for maintenance at Antwerp, I cannot at present see that the Act allows a seaman to claim that.

With regard to the railway fare from Grimsby to West Hartlepool, I cannot see how the plaintiff can recover that after he has agreed to go to Grimsby. With regard to the claim for wages and rations from the date of discharge until payment or judgment, that claim seems to me to be wholly untenable. The appeal must, therefore, be dismissed.

A. L. SMITH L.J. I agree with what has been said by the Master of the Rolls as to the construction of s. 186 of the Merchant Shipping Act, 1894. Clauses (*a*), (*b*), and (*c*) of sub-s. 2 deal with the arrangements between the master and the seaman alone. Clause (*d*) brings in a third party, the consular officer. If the master does not comply with one or other of the clauses (*a*), (*b*), or (*c*), he must, under clause (*d*), deposit with the consular officer such a sum of money as is by the consular officer deemed sufficient to defray the expenses of the seaman's maintenance and passage home. In my opinion,

the consular officer is put above the master and the seaman. He is named as an arbitrator to determine between them. He is to determine what sum is sufficient to pay for the seaman's maintenance and passage home, and his order the master is bound to obey. Let me put this case. Suppose the consular officer thinks that 10*l.* is a proper sum to be deposited by the master for the seaman's maintenance and passage home from Antwerp to Grimsby. Though that may be far too high a sum, the master must pay it, and neither the master nor the shipowner has any appeal from the consular officer's decision. If, on the other hand, the consular officer names too small a sum, the seaman has no appeal from his decision. The master has performed his obligation under the section if and when he has deposited such a sum as the consular officer thinks sufficient. Therefore, the master in this case has shewn that he has done all that was required of him by the statute; and, as this is an action based upon the statute, the action is not maintainable against the shipowners. That is enough to decide this case; but as this is a test action, and as the parties wish to have our opinion as to the true construction of the section, I desire to say that, in estimating the sum which should be deposited by the master, the consular officer should take maintenance as well as the passage home into consideration. Then, as regards the port to which the seaman ought to be sent, in this case the seaman agreed to go to Grimsby. But I agree with the Master of the Rolls that a "passage home" means a passage to the port at which the seaman was shipped, or a port in the United Kingdom to which he agrees to go. If, for instance, he was shipped at West Hartlepool, it would not do to send him back to London, unless he agrees to go there. As regards the claim for maintenance at Antwerp, as at present advised I am inclined to think, though it is not necessary to decide it, that the Act does not impose that obligation upon the shipowner; and as regards the train fare from Grimsby to West Hartlepool, I fail to see how that claim can be maintained in the circumstances of this case. I have given my opinion upon these various points as the parties desire to have a construction placed upon the statute, but the ground of my decision is that the master

C. A. 1897

EDWARDS v. STEEL, YOUNG & CO.

has fulfilled clause (*d*), and, therefore, no action lies against the shipowners.

RIGBY L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitors for defendants: *W. A. Crump & Son.*

E. L.

C. A. 1897 *May* 6, 7; *July* 16.

[IN THE COURT OF APPEAL.]

CONSERVATORS OF THE RIVER THAMES *v.* SMEED, DEAN & CO.

Thames—Conservators—Right to take Sand—Rights of Owner of Shore—"Bed of the Thames"—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 87, 238.

Sect. 87 of the Thames Conservancy Act, 1894, makes it unlawful for any person other than the conservators, their agents, &c., to dredge or raise any gravel, sand, ballast, or other substance from "the bed of the Thames" except with the licence of the conservators:—

Held, that the expression "bed of the Thames" in the section, as applied to the tidal portion of the river, means the soil between the ordinary high water mark on one side and the ordinary high water mark on the other side; and that the right of the owner of the soil to take gravel, &c., between high and low water mark is not preserved by s. 238 of the Act.

Semble, the conservators can only exercise their powers of dredging and granting licences for dredging for the purposes of the Act, i.e., for the maintenance and improvement of the navigation.

Ordinary meaning of "bed of river" defined.

Pearce v. *Bunting*, [1896] 2 Q. B. 360, disapproved of.

APPEAL from the judgment of Bruce J. at the trial before him without a jury.

The action was brought for a declaration that a place called Hadleigh Ray was a part of the "bed of the Thames" within the meaning of s. 87 of the Thames Conservancy Act, 1894, and for an injunction to restrain the defendants from raising

sand, gravel, ballast, or other substances therefrom without the licence of the plaintiffs.

The defendants had taken sand from the place in question, which was in Essex, between high and low water mark of the River Thames, by licence from the proprietor of the soil.

The learned judge, upon the authority of *Pearce* v. *Bunting* (1), gave judgment for the defendants.

May 6, 7. *Jelf, Q.C.*, and *J. E. Bankes*, for the plaintiffs. The natural signification of the expression "bed of the Thames," as applied to the tidal portion of the river, would include all the soil between the ordinary high water marks on each side of the river. There is nothing in the other sections of the Thames Conservancy Act, 1894, upon the true construction of them, to restrict the meaning of the expression "bed of the Thames" as used in s. 87.

Sect. 238 of the Act does not save the right of the defendants' licensor to take gravel, &c., from the place in question, because that section begins with the words "except as in this Act expressly provided," and s. 87, if the plaintiffs' contention is correct, does expressly provide that no one shall take gravel, &c., from the place in question without the licence of the plaintiffs.

Scrutton (*Channell, Q.C.*, with him), for the defendants. The term "bed" of a river does not in the case of a tidal river include the space between high and low water mark. In many sections of the Act the "shore" of the Thames is spoken of as not forming part of, or as distinguished from, the "bed." The word "shore" is defined by s. 3 of the Act as meaning the shores of the Thames so far as the tide flows and reflows between high and low water marks at ordinary tides. It is contended that, upon a review of the provisions of the Act as a whole, it is clear that the term "bed" is used in the Act as indicating only the soil between the ordinary low water marks on each side of the river and not including the shore. In *Pearce* v. *Bunting* (1) the Divisional Court decided that that was the true construction of s. 87.

Sect. 238 applies, because the provision of s. 87 is expressly

(1) [1896] 2 Q. B. 360.

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & CO.

made "subject to the provisions of this Act," of which s. 238 is one. The presumption is against a construction that would deprive private owners of their proprietary rights without compensation.

Jelf, Q.C., in reply.

Cur. adv. vult.

July 16. The following written judgments were read :—

A. L. SMITH L.J. This action is brought by the Conservators of the River Thames, asking for a declaration that a place called Hadleigh Ray, in the county of Essex, is part of the "bed of the Thames" within the meaning of s. 87 of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), and for an injunction restraining the defendants from dredging, and raising gravel, sand, ballast, and other substances therefrom without the licence of the plaintiffs. Had the plaintiffs asked for a declaration that they were entitled under that section to license persons to dredge, and raise gravel, sand, and other substances, as they thought fit, from the place in question, irrespective of whether such dredging and raising was for the purpose of preserving and fostering the navigation of the Thames, for reasons hereafter given I should have said that the plaintiffs would not have been entitled to it.

Hadleigh Ray lies adjacent to the left bank of the Lower Thames, within the jurisdiction of the conservators, and is situated between the high and low water marks of the river at ordinary tides : i.e., when the tide is in, it is covered with water, and the navigation of the Thames, whether for profit or pleasure (s. 72), passes and repasses over it ; and when the tide is out it forms part of the shore of the river. It is the property of Mr. Booth, whom I will call the licensor of the defendants, who have been raising sand therefrom without the licence of the plaintiffs.

The view I take of the Act of 1894 is this : The conservators are a statutory body brought into existence for the purpose of preserving, improving, and maintaining the navigation of the River Thames from Cricklade to Yantlett Creek (and they have some jurisdiction below that creek), but the powers granted to

them by the Act of 1894 are all subservient thereto, and except for these purposes no powers are granted to them at all. I omit the powers given to them for keeping the waters of the Thames pure, for these have no bearing on this case.

Keeping this in mind, I take first of all s. 87, to see what powers are thereby granted to the conservators, for it is upon the true construction of this section that the decision of this case depends. The section is as follows: "Any person with and in accordance with the licence of the conservators under the hand of the chairman . . . . may dredge and raise gravel, sand, ballast, and other substances from the bed of the Thames other than that portion thereof mentioned in the section of this Act whereof the marginal note is 'reservation of part of the bed or soil,'" that is "other than that portion of the bed or soil or shore of the Thames"— to state it shortly—reserved to Her Majesty (see s. 59)—"but subject to the provisions of this Act it shall not be lawful for any person other than the conservators, their agents, servants, and workmen to dredge or raise any gravel, sand, ballast, or other substance from the bed of the Thames other than that portion thereof mentioned in the said section"—i.e., s. 59—"except with and in accordance with such licence, and if any person acts in contravention of this enactment he shall for every such offence be liable to a penalty not exceeding 20*l.* without prejudice to any other remedy or proceeding against him: Provided that nothing in this section shall take away, prejudice, or affect the rights, if any, of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames above the City Stone above Staines Bridge which would have been vested in or exercisable by the owners of the soil of such bed if this Act had not been passed."

It must here be noticed that there is no saving clause in this section which is designated as an enactment in favour of owners of the soil of the bed of the Thames below Staines, though it is argued that such a saving clause should be read into this section. I will deal with this hereafter. As I read this section it empowers the conservators to grant licences to persons to dredge, and raise gravel and other substances from

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

A. L. Smith L.J.

the bed of the Lower Thames, and it prohibits any one not a licensee (except the conservators by themselves, their agents and servants) from so doing. Now the question is, what do the words "from the bed of the Thames other than that portion of the bed, or soil, or shores of the Thames reserved to Her Majesty" mean? Do they mean the bed of the Thames between ordinary high water mark on one side and ordinary high water mark on the other side of the river; or do they mean only that part of the bed of the Thames which is exclusive of the shores? There is certainly no such limitation in the section. Then what is the primâ facie meaning of the words the "bed of the Thames"?

In my judgment they denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river. It need not be constantly covered if in the ordinary course of things it is habitually covered. I will cite a passage from the judgment in an American case, namely, that of the *State of Alabama* v. *State of Georgia* (1), which I cited in my judgment in *Hindson* v. *Ashby* (2), for it exactly conveys what I understand by the meaning of the phrase "bed of a river." It is this: "The bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." This, when applied to a tidal river, means without reference to extraordinary tides at any time of the year. This in my judgment is the primâ facie meaning of the words "bed of the Thames," and the question is, in the Act of 1894, is there a context which causes the words not to bear their primâ facie and ordinary meaning?

In the unreported case in 1891 of *Goolden* v. *Conservators of the Thames* (3), a construction was placed by the House of Lords upon the words "bed of the Thames" in s. 6 of the Thames Conservancy Act of 1867, which Act, although repealed

(1) (1859) 64 U. S. 515. (2) [1896] 2 Ch. 1, at p. 25.
(3) Unreported.

by the Act of 1894, has, as regards ss. 6 and 7 thereof, in substance been re-enacted in the Act of 1894 by ss. 83 and 87, with the addition of the saving clause in s. 87 in favour of the owners of lands above Staines. This case throws a considerable light upon some of the points raised in the present action, though I notice that neither my brother Cave nor my brother Wills, in their judgments in the case of *Pearce* v. *Bunting* (1), alluded to it. It is to review their decision in this last case that the present action is brought.

Sect. 6 of the Act of 1867, upon which the House of Lords gave judgment, is as follows: "The Conservators may from time to time dredge, dig, raise, take up, and remove any shoals, shelves, or banks in the bed of the Thames and deepen and otherwise improve the same between the City Stone near Staines and Cricklade and may carry away, and sell, or otherwise dispose of the gravel, sand, and other substances thereby obtained." Sect. 7 is this: "It shall not be lawful for any person other than the Conservators, their agents, servants, and workmen to dredge, dig, or raise any gravel, sand, or other substance from the bed of the Thames between the City Stone near Staines and Cricklade except with the licence or consent of the Conservators under their Common Seal . . . . and, if any person acts in any respect in contravention of this section, he shall for every such offence be liable on summary conviction to a penalty not exceeding £20 without prejudice to any other remedy or proceeding against him." These sections when passed only applied to the Upper Thames above Staines, but by s. 29 of the Thames Navigation Act, 1870, these two sections were made to extend and apply to the Thames below the City Stone, near Staines, to Yantlett Creek. Thus, after the year 1870, these two sections applied to the whole Thames from Cricklade to Yantlett Creek, and did so when *Goolden's Case* (2) was decided in 1891 by the House of Lords. Whatever the "bed of the Thames" meant in s. 6 of the Act of 1867, it meant the same in s. 7 of that Act, which last section is almost identical with s. 87 of the Act of 1894, excepting the proviso saving the rights of owners above Staines, which is expressly inserted in s. 87 of

(1) [1896] 2 Q. B. 360. (2) Unreported.

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

A. L. Smith L.J.

the Act of 1894. The House of Lords in *Goolden's Case* (1) held that the words "bed of the Thames" in s. 6 of the Act of 1867, meant the soil underneath the waters of the river situated between bank and bank, and the dredging powers of the conservators conferred by this section extended not only to that part of the Thames above Staines which was navigable, but also to that part of the Thames which was not navigable and which was the private property of a riparian owner. That this section was held to take away and interfere with private rights is beyond dispute, and that although no compensation was given to the owner of the soil for this deprivation of his rights. The House of Lords also held that the dredging powers of the conservators were limited to improving the bed of the river, that is, to the exercise of the powers conferred upon them by the Acts, and that, if dredging were carried on by the conservators for purposes other than that of exercising the powers conferred upon them by the Act, such dredging would not be permissible. I think that what the House of Lords then held has pointed application to the true construction of s. 87 of the Act of 1894.

I now turn to the group of sections with the heading "Dredging and Ballasting" in the Act of 1894, namely, ss. 83 to 89 inclusive, of which group s. 87 forms a part, to see what are the powers the conservators have had conferred upon them as regards dredging and ballasting by these sections, and to see whether any context can be derived therefrom as to any special meaning to be applied to the term "bed of the Thames." Sects. 83 to 86 inclusive are sections enabling the conservators to do certain acts. Sect. 87 is the section which empowers the conservators to prohibit others from doing certain acts. Now s. 83 enacts that the conservators may from time to time do all or any of the following things—(1.) For the purpose of maintaining and improving and freeing or keeping free from obstruction the navigation of the Thames: (*a*) "Dredge, cleanse and scour the Thames." This, I should say, embraces the whole of the Thames within the jurisdiction of the conservators, and so far as is material to this case, from high water mark on the one side of the river to high water mark on the

(1) Unreported.

other below Teddington Lock to Yantlett Creek. It is over this area the navigation of the Thames, whether for profit or pleasure, is entitled to pass and repass (s. 72), and over this area the conservators are empowered to dredge, cleanse, and scour the Thames for navigation purposes. Dredging necessarily involves raising the gravel, sand, and other matter dredged, for otherwise what is the use of dredging? (*b*) "Alter, deepen, restrict, enlarge, widen, diminish, lengthen, shorten, straighten, and improve the bed and channel of the Thames." It is not necessary for this case to determine whether the context of the sub-section limits the "bed of the Thames." (*c*) "Reduce or remove shoals, shelves, banks, or other accumulations in the Thames." This, as it seems to me, is the same as sub-s. (*a*) which I have dealt with. (*d*) "Abate or remove . . . . all impediments, obstructions, and annoyances . . . . in the Thames or on the banks or shores thereof." This sub-section appears to have been taken from s. 98 of the Thames Conservancy Act of 1857. By s. 3 of the Act of 1894 "shore" means "shores of the Thames so far as the tide flows and reflows" (i.e. up to Teddington Lock) "between high and low water marks at ordinary tides." It will be noticed that these four sub-sections to s. 1 deal with what the conservators may do for maintaining, improving, and keeping free from obstruction the navigation of the Thames.

But they have other powers. By sub-s. 2 of s. 83 the conservators may dredge, and raise gravel, sand, and other substances from the Thames. This phrase appears to me to be equivalent to what I have dealt with under sub-s. (*a*), but only for the purposes of the towpaths and for filling up creeks, inlets, bends, flats, and slob lands in and adjoining the Thames, and for constructing, altering, and repairing such works. There is a proviso to this sub-section in favour of that part of the river above Staines, namely, that gravel, sand, and other substances dredged or raised above Staines for these purposes shall be used for such purposes above Staines. This section also has reference to the matter of the better navigation of the Thames. By sub-s. 3 of s. 83 the conservators may dredge, and raise "from the Thames" below Teddington Lock, ballast for supplying

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & CO.

A. L. Smith L.J.

the same to vessels in the Thames. This relates to carrying on navigation in the Thames. By sub-s. 4 of s. 83 the conservators may sell the overplus of the gravel and sand raised for the purposes aforesaid if not wanted for such purposes, but only the overplus. Lord Herschell deals with this power of sale of surplus in the *Goolden Case*. (1) Sub-ss. 5 and 6 of s. 83 also apply to the ballasting of ships in the Thames. By ss. 84 and 85 "in the Thames" and "the course of the Thames" are the words used, and these sections also apply to navigation purposes. By s. 86 the conservators are empowered to deposit gravel, sand, and other substances raised by them for the purposes of the preceding sections upon lands belonging to them, or may in or upon the bed of the Thames "place piles and make groynes, retaining walls, and other works, and may sell and dispose of lands thereby filled up, raised, or reclaimed." In this section "bed of the Thames" appears clearly to include the shore between ordinary high and low water marks; for how can a retaining wall be placed in the bed of the river below low water mark? And if so for what purpose? I have dealt thus far with the group of sections, and they in my judgment amply suffice to shew that no context can be obtained therefrom, shewing any peculiar meaning to the words "bed of the Thames," and it will be seen from the judgment about to be delivered by my brother Chitty that he sets out with particularity and in detail the many other sections which have in them the words "shores," "bed of the river," and other expressions. These sections I have considered, and the result is that, in my judgment, it is not possible to arrive at any context therefrom, and I can find nothing in the Act which can be relied on as cutting down the ordinary and primâ facie meaning of the words the "bed of the Thames" in s. 87. My judgment upon this peculiarly ill-drawn Act is, that the conservators by themselves, their agents and servants, have power to dredge, and raise gravel, sand, ballast, and other substances from all parts of the River Thames within their jurisdiction between ordinary high water mark on one side of the river and ordinary high water mark upon the other, if they do so for the

(1) Unreported.

purpose of preserving, improving, and maintaining the navigation of the Thames, or for the other navigation purposes mentioned in the Act; and that they are also empowered to grant licences to other persons to dredge, and raise gravel, sand, and other substances for like purposes, but for no other; that by s. 87 there is an absolute prohibition imposed against any one dredging, or raising gravel, sand, ballast, or other substances in the Thames between ordinary high water mark on the one side and ordinary high water mark on the other, without the licence of the conservators, even although the soil between those limits is private property; and that for doing so without the licence of the conservators the penalty mentioned in the section attaches.

My judgment only applies to the Lower Thames.

In the case of *Pearce* v. *Bunting* (1) above mentioned my brother Cave relied greatly, and my brother Wills also to some extent, upon the fact that, as no compensation was given by the statute, it was improbable that private rights would be interfered with by the Legislature, and this ordinarily is so; but the case of *Goolden* v. *Thames Conservators* (2) in the House of Lords indicates that these dredging powers are given to the conservators for navigation purposes, without compensation being also given to private owners for having their rights thus interfered with. I may point out that by s. 72 of the Act of 1894 public rights of navigation are given over private waters, and the sole saving clause therein in favour of landowners is that they may prevent the anchoring, mooring, loitering, or delay of any vessel thereon, and no compensation for this deprivation of their rights taken away by the section is given to the landowners. The question, as it seems to me, is not what soil has been vested in the conservators, which my brother Cave held to be the question, but what powers of dredging, and raising gravel, and other substances, and of granting licences to others to do so, have been granted by the statute to the conservators whereby to preserve, improve, and maintain the navigation of the Thames. If a private owner were to be allowed to dredge, and raise gravel from the bed of

(1) [1896] 2 Q. B. 360. (2) Unreported.

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & CO.

A. L. Smith L.J.

the Thames in the tideway at his own will and pleasure, it is manifest that this might so interfere with the flow of the river as in some cases to seriously impede its navigation; and, in my opinion, to prevent and guard against this, it is that this plenary and exclusive power of dredging, and raising gravel and other substances, is given to the conservators over that part of the bed of the Thames where Hadleigh Ray is situated.

As to the point taken on behalf of Mr. Booth, that his rights were saved by s. 238 of the Act of 1894, it will be seen that this section commences with the words "except as in this Act expressly provided," and, if my construction of s. 87 be correct, it has been expressly provided that no one other than the conservators and their licensees may dredge and raise gravel from the bed of the river, and s. 238 therefore does not avail him. As regards the suggestion that the words in s. 87, "but subject to the provisions of this Act," apply to s. 238 of the Act, I do not agree with it. There are other sections to which these words apply, and one instance will suffice, namely, s. 234, sub-s. 3, which enacts that "nothing in this Act shall prejudice or affect any right of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames conferred on the Tilbury Company." The owner of Hadleigh Ray has had no such section inserted in his favour. It is to a provision such as this that the words in s. 87, "subject to the provisions of this Act," in my opinion, apply, and not to s. 238, which, for the reasons above, does not refer to s. 87. If rights of private owners in the Lower Thames were intended to be preserved as regards dredging and raising gravel, it appears to me inconceivable that the Legislature should not, in s. 87, have reserved these rights as they did the rights of private owners in the Upper Thames. This, however, is pointedly and in my judgment intentionally omitted.

For the reasons above, I think that this appeal should be allowed, and that it should be declared that the respondents are not entitled to dredge or raise gravel, sand, or other substances at Hadleigh Ray without the licence of the conservators. In my judgment this appeal should be allowed.

CHITTY L.J. The question in this appeal is whether the defendants are entitled to dredge or raise any gravel, sand, ballast, or other substance from the land known as "Hadleigh Ray," between high and low water marks at ordinary tides of the River Thames, without the licence of the conservators. The question is raised as a point of law on the construction of the Thames Conservancy Act, 1894, and was argued on the assumption, agreed to by the parties, that the soil is owned by the licensor of the defendants. Hadleigh Ray is situate in Essex, on the north side of the river, and lies within the jurisdiction of the conservators. It is part of the "shore" of the Thames within the meaning of the definition in the 3rd section of the Act. It is subject at common law to the public right of navigation in a tidal river, including all incidental rights such as grounding a vessel till the tide serves: see *Mayor of Colchester* v. *Brooke* (1); it falls within the provisions of the 72nd section of the Act, whereby it is enacted that it shall be lawful for all persons, whether for pleasure or profit, to go and be, pass and repass, in vessels over or upon every part of the Thames through which Thames water flows, and whereby certain rights of mooring and the like are conferred on the public. The learned judge before whom the question came on for argument in the Court below, felt himself bound by the decision of the Divisional Court in *Pearce* v. *Bunting* (2), and accordingly gave judgment for the defendants. The object of the conservators in instituting this civil action and bringing this appeal was to obtain a judgment of this Court overruling the decision of the Divisional Court, from which no appeal lay.

The more important sections on which the question turns are the 87th and the 238th, but the argument took a wide range and extended to numerous other sections of the Act of 1894, and of the preceding but repealed Acts from 1856 downwards. Three principal points were raised: First, as to the meaning of the term "bed of a river" in its ordinary acceptation, the plaintiffs contending that it includes the shore, and the defendants that it does not; secondly, as to the meaning of the term "bed of the Thames" in the 87th section, regard

(1) (1845) 7 Q. B. 339. (2) [1896] 2 Q. B. 360.

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & CO.

Chitty L.J.

being had to the context and the rest of the Act; and, thirdly, as to the effect of the 238th section, the defendants contending that it saved all the proprietary rights claimed by them on behalf of their licensor.

The Act which we have to construe is a consolidating and amending Act; the general object of such Acts is to present the whole body of the statutory law on the subject in a complete form, repealing the former statutes. The principle of interpretation of a codifying Act is laid down by Lord Herschell in *Bank of England* v. *Vagliano* (1): a statute codifying the law is to be interpreted as it stands, and recourse is not to be had to the former law, except upon some special ground, such, for instance, as an ambiguous provision. The same principle applies to such an Act as that which is now before us, but in a less stringent degree. In this Act clauses of the repealed Acts are found repeated, but often in altered form, and with amendments, whereby the sense may be in great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand, and that a minute critical examination of repealed clauses ought not be entered upon for the purpose of interpretation, except upon special grounds.

So far as relates to the questions raised, the Act under consideration is not a specimen of good drafting. It is, on the face of it, not the production of one firm hand; probably many hands took part in the drafting before the Act assumed its final form. Many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing.

The Conservators of the Thames are a body originally created by statute, and finally reconstituted by the Act of 1894 with more extensive powers over the Thames. The Act recites that it is expedient that the powers of the conservators for preserving, freeing from obstruction, and improving the navigation of the River Thames, whether for profit or pleasure, should be extended as in the Act appears. The powers of the conservators include the maintenance of the purity of the water, and certain other matters not material to the present case. The

(1) [1891] A. C. 107, at pp. 144, 145.

powers which are relevant are those relating to the maintenance and improvement of the Thames as a navigable river. These powers are committed to the conservators for the general benefit of all concerned with the river, as well of the public using the river for navigation as of the owners of the soil including the shores and the banks; it is for the common benefit of all concerned that these statutory powers are centred in one representative and responsible body: see ss. 8, 9. Experience had shewn that the maintenance of the navigation along this great public way could not be left to the common law and the individual proprietors along the course of the river from its source to the sea; and no substantial improvements could be effected without statutory powers.

Dredging in the river has always an effect, more or less according to the extent of the operation, upon the flow of the water and the navigation of the river. There is no substantial difference in the effect, whether the dredging takes place above or below the flow of the tide, nor whether it is carried on in the bed, in the narrow sense for which the defendants contend, or in the shores over which the ordinary tides flow. The claim set up by the defendants is a right to dredge to any extent at their free will and pleasure, and without limit of any kind. It is part of their case as presented at the Bar that they are not bound by any consideration of the navigation; they claim to remove the gravel and sand in unlimited quantities for the purposes of profit by sale to brickmakers and others. Certainly, if their claim is well founded, their operations may have a serious effect upon the navigation of the river.

The Act contains in the 3rd section definitions, guarded in the usual fashion, of "the Thames" and of the word "shore," but does not contain any definition of the word "bed." The expression "the Thames" means and includes so much of the Rivers Thames and Isis respectively as are between the town of Cricklade, in Wiltshire, and an imaginary straight line drawn from the entrance to Yantlett Creek, in Kent, to the City Stone opposite to Canvey Island, in Essex, and so much of the River Kennet and other rivers as is mentioned in the definition. The Thames, therefore, as I read the definition, includes so much of the shore

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & CO.

Chitty L.J.

where the tide flows as is covered with water at high water at ordinary tides. The word "shore" means the shores of the Thames so far as the tide flows and reflows (that is, up to Teddington Lock) between high and low water marks at ordinary tides. The term "bed of the Thames" not being defined is thus far left to bear its ordinary meaning. The definition of "shore" cannot of itself be properly made use of to limit the ordinary meaning of the bed of the Thames. If that term is large enough to include the shore where the tide flows, it is not, in my opinion, a legitimate course of reasoning to say that its meaning is cut down because shore is defined.

Now the reason for defining "shore" must be found in the Act itself. It occurs in fourteen sections at least of the Act, in thirteen sections with other words and in one section without, namely, in the 58th, 59th and 60th sections, the 69th, the 83rd, 92nd, 111th, 116th, 182nd, 184th, 185th, 204th, 205th and 239th. The view I take of the 58th, 59th and 60th sections is this. I think that they are conveyancing sections whereby certain property and powers vested in the conservators at the passing of the Act are continued in them, notwithstanding the repeal of prior Acts and the alteration of the constitution of the conservators by the Act itself, and whereby there is also continued the express reservation in the specified Crown property as such reservation existed at the passing of the Act. The words used in these sections are "the bed and soil and shores of the Thames" (s. 58); "the portion of the bed or soil or shores of the Thames" (s. 59); and "the banks, shores and wharfs of the Thames" (s. 60). According to the practice of conveyancers (and an excellent practice it is), the same set of words is used in the conveyance and reservation as were used in the original conveyances and reservations. The history of these sections is traced by Cave J. in his judgment in *Pearce* v. *Bunting*. (1) His judgment rests, in a considerable measure, upon them and on the use of the term "shores" in addition to "bed" and "soil," indicating, in his opinion, that "shore" is distinct from, and is not included in, the term "bed." He apparently confines the dredging powers of the conservators to

(1) [1896] 2 Q. B. 360.

the property vested in them. In this opinion I am unable, viewing the whole Act, to concur. I think that these sections do not limit the conservators' powers of dredging, whatever they may be, as disclosed by the other parts of the Act, and that such powers are not confined to the property vested in them.

Following out the sections in which the word "shores" occurs, I come to the 69th, empowering water-bailiffs to seize fish unlawfully taken and prohibited apparatus, not only on the water of the river, but on the shores or banks of the river. It was obviously convenient to extend the powers to the shore, and to mention the shore specifically. Similar observations occur to me as properly applicable to s. 83, sub-s. 1 (*d*), in regard to the removal of obstructions and nuisances. I say the same of the 92nd section, sub-s. 1, relating to the putting of gravel or other substances, or stones, or rubbish, into the Thames or on the shore thereof, whence it might be washed into the river. The 111th section prohibits the making of docks and other works or erections as enumerated, upon the bed or shores of, or afloat in the Thames, without the conservators' licence. The 116th section relates to the consideration for any licence granted by the conservators for doing in or upon the bed or shores of, or afloat in the Thames below Teddington Lock, any of the things enumerated at great length, including docks, piers and embankments, and walls. This section appears to interfere in some degree with the rights of the proprietors of the soil of the shores as set up by the defendants without qualification or compensation. The 182nd section prohibits the execution of works upon the bed or shores of the Thames below Teddington Lock by the conservators or their licensees without the permission of the Board of Trade. The 184th section relates to the removal of works executed without such permission. The consent of the owner of the shore is not in terms required by the 182nd section. The 185th section prohibits the discharge of guns over or upon the Thames or the shores, banks, or towpaths thereof, or any land for the time being vested in the conservators above an imaginary straight line drawn from Barking Creek to Margaret Ness. Here again

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

Chitty L.J.

a proprietary right of the owners of the shores, and also of the banks, is interfered with, as is generally done in the case of land near a highway, and it was considered necessary or expedient to include specifically shores, banks, and towpaths. The remaining sections are the 204th and 205th, relating to the jurisdiction of magistrates and the powers of the police. Here again it was apparently considered necessary or expedient to use words which would prevent questions being raised. I reserve the 239th section for the present. With that exception, I have dealt with all these fourteen sections necessarily in a very brief manner. In all of them, having regard to the subject-matter and the context, there would appear to be some reason why "shores" should be mentioned specifically. They are none of them (I still except the 239th section) dredging sections; and, regard being had to the variety of the words used, they do not appear to me to afford any safe guidance as to the meaning of the term "bed" in the sections specially relating to dredging. Whatever may be the force of the observations I have made on these sections, the sections themselves, at all events, supply the reason for the definition of the word "shore."

Recurring to the word "bed," I find it in at least sixteen sections of the Act, namely, ss. 58, 59, 62, 72, 83, 86, 87, 88, 89, 111, 182, 184, 204, 205, 234, and 239; in twelve sections with other words, such as soil or bed, bed and channel, bed or shores; and in four sections without any other words. It will not, however, serve any sufficiently useful purpose to go through these sections; the language of the Act cannot stand any critical examination.

I come now to the important group of sections, the 83rd to the 89th inclusive, placed under the head "Dredging and Ballasting." The 83rd section has already been carefully dealt with by A. L. Smith L.J. I concur generally in his observations upon this section. The powers conferred by the 1st sub-section are expressly granted for the purpose of maintaining and improving, and freeing from obstruction the navigation of the Thames. The leading power is that under (*a*) to dredge, cleanse, and scour the Thames. This is general, and, in my opinion, includes the shore. The powers under (*b*), (*c*), and (*d*)

seem to be subsidiary powers. I can see no sufficient reason for excluding the shores from (*b*) and (*c*): they are expressly included in (*d*). To an Act drawn as this is, I think it would be dangerous to apply the rule of expressum facit cessare tacitum. I decline to draw the inference that because shores are mentioned in (*d*) they are excluded from (*a*), (*b*), and (*c*). The 2nd sub-section also relates to navigation. The power to dredge and raise "from the Thames" gravel, sand, and other substances is conferred only for the purposes mentioned in the sub-section. Here again "the Thames" is mentioned. Why does the Thames not include the shore? The power to dredge and raise from the Thames below Teddington Lock, conferred by the 3rd sub-section, is expressly limited to the purpose of supplying ballast to vessels on the Thames, a purpose connected with navigation. The power in the 4th sub-section to sell or otherwise dispose of gravel and other substances is confined to gravel and substances raised by the conservators under the powers of the 83rd section, and not required for the purpose for which they were raised. The conservators have no unlimited or roving power to raise gravel and other substances; they have no power to carry on any general trade of raising and selling gravel and the like. In the 86th section it would be almost impossible to read the term "bed" in the restricted sense contended for by the defendants; "groynes" possibly might be placed in the bed taken in the restricted sense; but they are usually placed on the shore; and I cannot call to mind a single instance of a retaining wall being placed in the bed, in the narrow sense, nor can I understand what useful purpose it would serve if there placed.

I come now to the 87th section. It has already been stated; I shall not read it again. It divides itself into three parts. The first confers on the licensees of the conservators powers to dredge and raise gravel, sand, ballast, and other substances, from the bed of the Thames, except that portion which is mentioned in s. 59, that is, to put it shortly, in front of or immediately adjacent to lands reserved to the Crown. Turning to the 59th section, I find the words "the portion of the bed or soil or shores of the Thames." I am unable to extract any

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

Chitty L.J.

satisfactory light from this strange drafting; it would rather seem from the exception that the word "bed" in the 87th section includes the "shores," but I place no reliance on this point. My opinion on this first part of the 87th section is as follows. An unlimited power of granting licences to others to dredge is not conferred on the conservators. The only licences which the conservators can lawfully grant are licences to dredge and raise gravel and other substances for the same purposes as the conservators can by their own agents, servants, and workmen dredge and raise. The licensees however are by this 87th section expressly forbidden to dredge in the land reserved to the Crown by the 59th section; whereas by the 83rd section the conservators themselves (that is by their agents, servants, and workmen) are not expressly placed under the like prohibition. But the Crown rights seem to be fully protected by the 59th and other sections, such as the 213th. As the conservators themselves cannot directly carry on a general trade of raising and selling gravel, so in my opinion they cannot do so indirectly, by granting licences to others. As at present advised, I think that it is not competent for the conservators to make a profit by the grant of licences or to raise money by the grant of licences, though they may be entitled to make a reasonable charge for the grant sufficient to cover the actual expense in granting them. The powers of the conservators and their licensees to dredge are not directly before us in this action; but it is impossible to decide the actual question properly without taking them into consideration. The second part of the 87th section contains the prohibition on which the conservators rely. Laying aside for the moment the introductory words, "subject to the provisions of this Act," there appears to me to be an unqualified prohibition precluding any person other than the conservators, their agents, servants, and workmen, from dredging or raising gravel and other substances from the bed of the Thames other than the portion previously reserved to the Crown in s. 59. And I cannot find any sufficient reason for confining the expression "bed of the Thames" in the first or second part of the 87th section to a restricted sense excluding the shore. The third part of the section contains an express

reservation from the operation of the section itself in favour of the owners of the soil of the bed of the Thames above the City Stone above Staines Bridge of such rights, if any, of dredging, or raising gravel or other substances "as would have been vested in or exercisable by them if this Act [of 1894] had not been passed." This is significant; it imports that without the proviso the rights of the upper proprietors of the bed of the Thames would have been taken away by the previous parts of the section. There is no similar proviso as to the owners of the shores. The proviso, however, leaves open the question whether the word "bed" does or does not include the shores.

I now turn to the 239th section, which appears to have an important bearing. It relates to payments to be made by the conservators to the Crown. By the proviso at the end of the section the conservators are to pay to the Commissioners of Woods 500*l.* a year in lieu of all payments which would otherwise, pursuant to the section, be payable "in respect of ballast, sand, earth, or gravel dredged or raised by the conservators, or any person by their authority, from the bed or shores of the Thames." This proviso assumes that powers are conferred by the Act on the conservators and their licensees to dredge and raise gravel from the shores as defined, and affords an additional reason for holding that the expressions "the Thames" and "bed and channel" of the Thames in the 83rd section (sub-s. 1, (*a*) and (*b*), and the term "bed of the Thames" in the 87th section are not used in a sense which excludes the shores.

I come now to consider the first of the three points mentioned in an early part of this judgment, namely: What is the proper meaning of the term "bed" when applied to such a river as the Thames, which from its source as far as Teddington Lock is a non-tidal river, and from Teddington Lock downwards is a tidal river? In my opinion the bed of the Thames means, and includes, the soil or ground which is covered by water in the ordinary course of nature—the ground over which the water flows or on which it lies. I exclude all extraordinary causes whereby the volume of the water is increased or diminished,

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

Chitty L.J.

such as unusual floods or droughts, and unusual winds, which have a considerable effect on the tidal—and particularly the upper tidal—portions of the river. So far as the tide flows and reflows I include, as part of the bed, the soil or ground lying below high water mark at ordinary tides.

Such being my opinion on the ordinary and proper signification of the term "bed" when applied to a tidal river, I proceed to the second point: Is there on the face of this Act of Parliament sufficient ground to cut down this primâ facie meaning of the "bed of the Thames," and to exclude the shores as defined in the 3rd section? I have partially dealt with this point when going through particular sections. In my opinion there is not sufficient ground. Wending my way, as well as I can, through the mazes of this Act, and the variety of the words employed, I think that the Act does not restrict the meaning of the "bed of the Thames" in the 87th section. Unlimited dredging on the shores as defined would tend to change the course and flow of the water, and so impair the navigation of the river. There are in the higher parts of the river, reached by the tide, many considerable strands left bare at low water, the removal of which would change the course of the river and alter the navigation.

Under the second portion of the 87th section no fetter is imposed on the conservators in the granting or withholding the necessary licence. But I cannot presume that such a representative body as the conservators are would refuse to grant the licence to the proprietors of the shores as defined, where they were satisfied that the dredging might take place without injury to the navigation.

On the third point, whether the rights of the licensors of the defendants are saved by the 238th section, my opinion is that they are not. No doubt the general rule is that private rights are not taken away by an Act of Parliament without compensation (see *Lyon* v. *Fishmongers' Co.* (1)) But in *Goolden* v. *Thames Conservators* (2) the House of Lords held that the plaintiff's rights as proprietor of part of the bed of the upper part of the Thames were taken away without compensation by

(1) (1876) 1 App. Cas. 662. (2) Unreported.

the Thames Conservancy Act, then under consideration, but since repealed. A. L. Smith L.J. has already dealt with that decision. It does not directly govern the present case, because there is a difference between the language of that Act and the Act of 1894. The 238th section commences with an exception, "except as in this Act expressly provided." The question here is whether the second part of the 87th section comes within this section. Now it is urged for the defendants that the second part of the 87th section is not within the exception in the 238th section, because the second part is itself expressly made subject to the provisions of the Act, and therefore to the provisions of the 238th section. It must be admitted that there is some force in this argument. But, as I read the 87th section, it does expressly provide that no person other than the conservators and their licensees may dredge or raise gravel from the bed of the Thames, and I think that the words "subject to the provisions of the Act" are satisfied by applying them to other parts of the Act, exclusive of the 238th section. First, there is the proviso at the end of the 87th section itself, which is very significant. This proviso expressly saves the dredging rights of the proprietors of the Upper Thames, but is silent as to the rights of the proprietors of the Lower Thames. The inference from this proviso appears to be that the dredging rights of the latter are intended to be affected by the section. The argument for the defendants renders this proviso not only idle, but worse than idle. According to this argument the 238th section would have saved the dredging rights of the proprietors in the Upper as well as the Lower Thames without distinction. Secondly, there is the 234th section, sub-s. 3 which expressly enacts that "nothing in this Act shall prejudice or affect any right of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames conferred on the Tilbury Company under or by virtue of any Act." The 213th section seems to be another such section. There may also be others, such as ss. 218, 219, 222, 223, and 236; there is, however, not sufficient information before the Court to enable me to express any definite opinion on the subject. It would seem that in the case of the Grand Surrey Docks (s. 236)

C. A. 1897

THAMES CONSERVATORS v. SMEED, DEAN & Co.

Chitty L.J.

the proprietors have some power of dredging in the river opposite the entrance to the docks by virtue of their special Act (18 & 19 Vict. c. cxxxiv.) s. 64. The 238th section on the face of it does not save rights which are interfered with by express provisions of the Act, and some of such rights are interfered with without compensation; among these are, as I think, the rights of the lower proprietors to dredge without the licence of the conservators. The negative or prohibitory part of the 87th section is supplemental to the dredging powers of the conservators conferred in order to give effect to the main object and leading principle of the Act, namely, the maintenance and improvement of the river for the purpose of navigation by means of the conservators' powers.

For the reasons above stated I think that the appeal should be allowed, and the question of law answered in the negative.

LORD ESHER M.R. concurred.

Appeal allowed.

Solicitor for plaintiffs: *J. Hughes.*
Solicitors for defendants: *Farlow & Jackson.*

E. L.

WOOD, Appellant *v.* THE WIDNES CORPORATION, Respondents.

1897
July 23, 24.

Local Government — Local Authority—Powers—Notice to abate Nuisance—Power to require sufficient Water-closet to be provided—General Order requiring Adoption of particular System—Invalidity—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 36.

Sect. 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular water-closet system shall be adopted; but they are bound to exercise their discretion in each particular case, and therefore such a resolution is invalid, and invalidates proceedings taken in pursuance of it.

Tinkler v. *Wandsworth District Board of Works*, (1858) 2 De G. & J. 261, followed.

Case stated by justices.

The facts, so far as material to the point decided, were as follows:—

The appellant was the owner of certain houses, Nos. 52 to 68 Terrace Road, in the borough of Widnes.

The respondents were the local authority for the borough.

On February 12, 1895, the respondents confirmed a resolution of their Health Committee in the following terms:—

"Resolved that in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do as far as practicable order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve, and that the Highway, &c., Committee be requested to take such steps for the adoption of the first-named system generally throughout the borough."

On March 22, 1895, the respondents' sanitary inspector served on the appellant a notice, stating that there was a nuisance at 52 to 68 Terrace Road, caused by the state of the privies, and

1897

WOOD v. WIDNES CORPORATION.

requiring that they be converted into water-closets (either slop, waste, or cistern) to abate the nuisance.

On April 3, 1895, the notice not having been complied with, the inspector reported the matter to the respondents.

On April 9, 1895, it was resolved (after reciting the existence of the alleged nuisance) that "the local authority do by written notice require the owner or occupier of each of the said houses to provide a sufficient privy and ashpit furnished as aforesaid upon the waste water-closet system approved by the Corporation."

On April 23, 1895, notice was given to the appellant in accordance with the resolution of April 9. This notice not having been complied with, the respondents did the work, and summoned the appellant to recover, as private improvement expenses, the amount of the first instalment of the expenses incurred by them in doing such work. (1)

The justices made an order for payment.

The question for the opinion of the Court was, whether the resolution confirmed February 12, 1895, was valid, or, if not, whether it invalidated the subsequent proceedings.

C. A. Russell, Q.C. (*Rycroft* with him), for the appellant. The resolution confirmed on February 12 is ultra vires and invalid. Sect. 36 of the Public Health Act, 1875, only empowers the local authority to require the owner "to provide a sufficient water-closet." This cannot be read to mean that the local

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet, earth-closet, or privy, and an ashpit furnished as aforesaid, or either of them, as the case may require.

"If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses. . . . ."

Sect. 257 provides for the recovery of private improvement expenses from owners.

authority may require the adoption in all cases of any particular kind of water-closet which they may choose to order, and may refuse to sanction any other kind, however suitable and sufficient it may be for the particular house. In *Tinkler* v. *Wandsworth District Board of Works* (1), decided on the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 81, 85 (2), which contained provisions similar to those now under discussion, where an order was made, not with regard to the state of the particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district, the Lords Justices held that the board were exceeding their statutory powers. Turner L.J. said in that case: "I think that upon the true construction of the Act . . . . they" (the board) "were bound to exercise their discretion in each particular case,—that it was not competent to them to lay down any such general rule as that on which they have acted, and that in acting on that rule they have exceeded the powers given to them by the Act." (3) That decision is conclusive. The resolution being invalid, it follows that the subsequent proceedings were invalid, and the order of the justices is wrong.

McCall, *Q.C.* (*Bonsey* with him), for the respondents. The resolution was valid, and the justices' order is right. Sect. 36 makes the local authority the judge of the sufficiency of the accommodation to be provided; and the effect of that is to empower them to determine what sort of water-closet shall be provided. The local authority can order water-closets to be substituted for privies: *St. Luke's Vestry* v. *Lewis*. (4) It is equally reasonable that they should decide which of several kinds should be adopted. A discretion as to the nature of the works required to be done is vested in the local authority: *Hargreaves* v. *Taylor*. (5) *Ex parte Whitchurch* (6) was decided

(1) 2 De G. & J. 261.

(2) Sect. 81 and s. 85 (except so far as it relates to a drain or sewer, or work or apparatus connected therewith), are repealed by the Public Health London Act, 1891 (54 & 55 Vict. c. 76), s. 142. See now s. 37 of that Act.

(3) 2 De G. & J. at p. 273.

(4) (1862) 1 B. & S. 865.

(5) (1863) 3 B. & S. 613.

(6) (1881) 6 Q. B. D. 545; appeal dismissed on the ground that the matter was criminal, 7 Q. B. D. 534.

1897

WOOD v. WIDNES CORPORATION.

on ss. 94 and 96 of the Act, which are in different terms from s. 36. The judgment in that case goes to shew that the only mode of questioning the decision of the local authority in such a case as this is by appeal to the Local Government Board under s. 268.

[RIDLEY J. *Tinkler* v. *Wandsworth District Board of Works* (1) is against the respondents on that point.]

[He also referred to *St. James and St. John Clerkenwell Vestry* v. *Feary* (2); *Bogle* v. *Sherborne Local Board.* (3)]

C. A. Russell, Q.C., replied.

LAWRANCE J., after referring to the notices and resolutions set out in the case, and reading s. 36 of the Public Health Act, 1875:—It is not denied on behalf of the appellant that the local authority have power to order the substitution of a water-closet for a privy, but the complaint is that in the present case the respondents seek to lay down a general rule requiring the adoption of a particular water-closet system in all future cases. In my judgment they are not entitled to lay down any such rule. The case of *Tinkler* v. *Wandsworth District Board of Works* (4) is a clear authority shewing that the local authority must inquire as to every house, and are bound to exercise their discretion in each particular case. The only power which is given to them by s. 36 is to require that a sufficient water-closet be provided; the section does not give them power to require that any particular kind of water-closet shall be adopted. In the present case they make a general rule that in all future cases a particular kind of water-closet shall be provided. The conclusion at which I have arrived with regard to the first question in the case is, that the resolution confirmed on February 12, 1895, was not valid, and that it invalidated the subsequent proceedings. That being so, all the other questions asked in the case fall to the ground, and it becomes unnecessary to answer them. Our judgment must be in favour of the appellant.

(1) 2 De G. & J. 261, at p. 271, per Knight Bruce L.J.
(2) (1890) 24 Q. B. D. 703.
(3) (1880) 46 J. P. 675.
(4) 2 De G. & J. 261.

1897

WOOD v. WIDNES CORPORATION.

RIDLEY J. I am entirely of the same opinion. The question is whether the local authority have power to make a general rule applicable to all the houses within their jurisdiction, or whether they are bound to exercise their discretion in each particular case. Here they have adopted the former course. I am of opinion that it is not competent to them to enforce a general rule such as they seek to enforce by their resolution. The effect of the authorities which have been referred to is to shew the intention of the Act to be that the local authority shall not be entitled to insist on any particular style of water-closet being provided, but only on a sufficient water-closet. The respondents here pitch on the waste water-closet system, and give notice generally, without condescending to inquire and exercise their discretion in each particular case, that such system shall be adopted. No doubt in these matters uniformity is desirable, but I have come to the conclusion that it was not intended by the Act that the sort of uniformity required by the respondents should be enforced on every inhabitant of the borough. The appellant is right in contending that this is an attempt on the part of the respondents to enforce a general rule that a particular kind of water-closet shall be used in all cases, which they are not entitled to do.

Judgment for the appellant.

Solicitors for appellant: *Alfred Grundy, Son & Co., Manchester.*

Solicitors for respondents: *Sharpe, Parker, Pritchards & Barham, for H. S. Oppenheim, Town Clerk of Widnes.*

P. B. H.

C. A.
1897
July 12.

[IN THE COURT OF APPEAL.]

FORSTER *v.* CLOWSER.
DIPROSE, CLAIMANT.

Practice—Interpleader—Goods seized in Execution—Order for Sale—Application of Proceeds of Sale—"In such manner and upon such terms as may be just"—Order LVII., *r.* 12.

By Order LVII., r. 12, "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just."

A sheriff seized goods in execution under a judgment of the High Court. The goods were claimed by the grantee of a bill of sale, as security for a debt due to him from the judgment debtor. The debt was payable, with interest at a high rate per cent., by instalments extending over a period of several months, the greater part of which had not expired. The sheriff interpleaded, and a judge at chambers, on the application of the judgment creditor, under Order LVII., r. 12, ordered the sale of the goods, and the payment to the claimant of the balance of his debt with interest at the agreed rate, but only up to the time of such payment. On appeal:—

Held, by Lord Esher M.R. and A. L. Smith L.J., Rigby L.J. dissenting, that the power of the judge to make an order as to the application of the proceeds of the sale upon such terms as may be just was not limited by the practice of the Courts of Equity in suits for redemption, that the judge had power to make the order, and that the order was just.

APPEAL from an order of Grantham J. at chambers.

The plaintiff recovered judgment against the defendant, and execution was issued under which certain goods were seized on June 21, 1897. The claimant thereupon claimed the goods under a bill of sale, granted to him by the defendant on the previous 22nd of May, to secure a sum of money with interest thereon at the rate of 60 per cent. per annum. The principal money and interest were payable by monthly instalments extending over eighteen months. The sheriff interpleaded, and the learned judge made an order that the goods should be sold and that the proceeds of the sale should be applied in the first

place to the payment to the claimant of his principal debt with interest up to the time of such payment, in the next place in satisfaction of the claim of the execution creditor, and that the balance, if any, should be paid to the execution debtor.

The claimant appealed.

Cababé, for the claimant. The order applies to an execution followed by interpleader. If the goods are those of the claimant, primâ facie the sheriff should be ordered to withdraw. Where the value of the goods exceeds the beneficial interest of the claimant an injustice may be produced to the remedying of which Order LVII., r. 12, is directed. To the extent of directing a sale of the goods the rights of the claimant are interfered with, but it was not intended otherwise to interfere with his rights under the contract. His interest is determined by the contract, and the judgment creditor stands in the place of the grantor of the bill of sale, and has only an interest to the extent of the value of his equity of redemption. If the order stands, the execution creditor will have an interest greater than that of the judgment debtor. The expression "just" in the rule cannot mean that the claimant is to have less than his rights under the contract, and the exercise of the authority of the judge must be subject to the rules of the Court of Equity under which redemption of a mortgage would be decreed. This is not the case of the grantee seeking to enforce his security, all he has done is to claim the goods in order that the sheriff may retire, and if this is refused and the goods sold against him in invitum, he ought not to be placed in a worse position than that in which he would have been had the contract run its ordinary course. The extent of the interference with the contract is illustrated by the fact that preliminary expenses were not paid by the grantor of the bill of sale. In effect these expenses are spread over the whole period, and will be lost wholly or in part to the claimant if he is paid off before the contract time. [He cited *Pearce* v. *Watkins* (1) and *Brown* v. *Cole*. (2)]

Muir Mackenzie, for the execution creditor. A bill of sale holder takes his security subject to the statutory provisions of

(1) (1861) 2 F. & F. 377. (2) (1845) 14 Sim. 427.

C. A. 1897

FORSTER v. CLOWSER.

Order LVII., r. 12. There is a similar power given under s. 7 of the Bills of Sale Act, 1882, under which the Court has power to make an order that the contract shall come to an end, "if satisfied that by payment of money or otherwise the said cause of seizure no longer exists."

[RIGBY L.J. Does that mean more than that if the money then due is paid and the reason for the seizure fails the seizure is to be set aside?]

The power is not limited to restraining the grantee from removing or selling the goods, but extends to making "such other order as may seem just," and the case is analogous to the present one. The rights of the parties are not merely regulated by the contract between them, but are governed by statute and rules, and a judge has power not merely to interfere by ordering a sale and so altering the contract, but also to make such an order as to the proceeds of sale as may be just. It is submitted that the order made in this case was just and was authorized by the rule. [He cited *In re Morritt.* (1)]

Cababé, in reply.

LORD ESHER M.R. The whole question in this case depends on the construction of Order LVII., r. 12. The order deals with interpleader, which is a process of the Court and arises when property is in the hands of the Court by reason of seizure by the sheriff. To say that a mortgage by bill of sale over the goods of one person gave to another a legal right to all the property comprised in the bill of sale, though the debt might be small in comparison with the value of the goods, was a hardship which was met by the Interpleader Act and is now met by rules of which rule 12 is one. When the sheriff is directed to seize goods he is so far an officer of the Court, and the goods when seized are under the legal authority of the Court to satisfy the judgment of the execution creditor. Then the claimant comes and says that the Court cannot deal with the goods because of the contract between him and the debtor under the bill of sale which in law gives the claimant a legal right to all the goods. The Legislature, notwithstanding that legal right, has given

(1) (1886) 18 Q. B. D. 222.

power to the Court to inquire into the matter and to order the goods to be sold. If such an order is made the judge may direct the application of the proceeds of the sale in such manner and upon such terms as may be just. It is said that means that the proceeds are to be applied according to the rules of equity. By the common law there would be no power to order a sale, and no rule of equity could have applied to such a case because no court of equity would have interfered between a court of common law and its officer. The question, then, is not what is equitable or legal, but what is just. If the Court exercises its discretion wrongly, that is a matter for appeal. Is it any injustice to the lender of the money to say that so long as the money is out of his pocket and not paid he should have interest for it, but that the interest should cease when the principal is paid with interest to the date of payment? I cannot see anything unjust in such an order, and I think therefore that this appeal fails.

A. L. SMITH L.J. I agree that the order of my brother Grantham should be supported. The plaintiff obtained judgment and issued a fi. fa., which was put in the hands of the sheriff, and certain goods of the defendant were seized. The claimant came forward with a bill of sale, under which he claimed the goods. Under that bill of sale, the principal sum lent was to be repaid by monthly payments, extending over eighteen months, and interest thereon was payable during that period at 60 per cent. The learned judge ordered the goods to be sold, and that when they were sold the sheriff should first of all pay the claimant his debt and interest at 60 per cent. up to the time of payment, then pay the judgment creditor, and lastly pay any balance there might be to the judgment debtor. It is admitted that there was jurisdiction to make the order for the sale of the goods, but it is said not to order that the claimant should be content with interest up to the time when the debt to him was repaid. What he wants is that his contract as contained in the bill of sale should not be interfered with, and that he should have the 60 per cent. interest running over the whole of the eighteen months.

C. A. 1897

FORSTER v. CLOWSER.

A. L. Smith L.J.

The learned judge satisfied himself that the sale of the goods would produce more than was requisite to pay off the claimant's debt, and he was right in making the order for a sale. We are now told that in such a case the rules of equity in regard to redemption of a mortgage are applicable. In my opinion, the meaning of the rule is that when an interpleader summons is taken out by the sheriff and a bill of sale holder comes forward, then power is given by Order LVII., r. 12, to a judge to order the sale of the goods, and to make such an order as to the proceeds of the sale as is just. I find nothing which incorporates the rules of equity with regard to the redemption of mortgages, and I think that the order made by the learned judge was a just order, and should not be interfered with. Every bill of sale holder must be taken to know what may happen in the case of an interpleader.

RIGBY L.J. Rule 12 of Order LVII. interferes in important particulars with the rights of the holder of a bill of sale, and gives the Court power in proper cases to direct a sale of the goods included in the bill of sale. The question before us is in substance whether anything more than that was intended by the rule.

I venture to think that the two clauses of the rule should not be separated. The power of the Court to direct a sale and the power to determine how the money should be distributed should be taken together. If there can be no just distribution of the proceeds of a sale, in my opinion no sale should be ordered. The word "just," as applied to the distribution of the money, cannot merely mean what a judge may choose to direct. Does it mean anything more than according to the rights of the parties—I mean, of course, in matters of substance, and not in regard to mere technicalities? It is not unimportant to notice that a parallel interference with the rights of mortgagees was introduced so far back as 1852. By s. 48 of 15 & 16 Vict. c. 86, the Court may direct a sale of mortgaged property instead of a foreclosure on such terms as it may think fit. According to my recollection, the Court has never assumed to itself an arbitrary power under this section to alter the terms of the con-

tract between the mortgagor and the mortgagee. The word "fit" has been taken to mean proper under the existing contracts. I should have thought that rule 12 went no further, and did not enable a judge to act as an arbitrator to alter the rights of the parties. In many cases without doubt a sale of the goods is desirable: if, for instance, it is shewn that the security is large and the holder amply secured, the Court might direct the sale of a part of the goods and payment of the execution creditor out of the proceeds. On the other hand, it may be that the security is insufficient, and if there is this arbitrary power in the judge, he is not bound to consider whether it is sufficient or not. I do not think it just, where there is a property which, if nursed, might prove a sufficient security, to order a sale which will take away that security. That would be to give to the execution creditor an interest in the goods greater than that of the maker of the bill of sale. If this case were to be determined by my judgment, I should be disposed to limit the words of the rule by applying the practice of equity, which is that branch of our courts which has to do with similar matters, and to adopt the analogy of decisions in that court as applicable to this case. The arguments used in this case will apply equally to all cases of loans for a term of years at a fixed rate of interest. I do not think it can be said to the lender that he is just as well off and will get his money back if he is paid off at once, because that is not the bargain he has made. If one of the terms of the contract is that he is not to be paid off for a term of years, a Court of Equity would not put a limitation on his rights under that term of the contract. I think, therefore, that the order of the learned judge should not be supported.

Appeal dismissed.

Solicitor for execution creditor: *W. J. Greig.*
Solicitor for claimant: *John Westcott.*
Solicitors for sheriff: *William & T. Burchell.*

A. M.

1897
June 3;
C. A.
June 29.

[IN THE COURT OF APPEAL.]

STEVENS *v.* GRIFFIN.

Practice—Taxation of Costs—District Registry—Review of Taxation—Retaxation by Master of Supreme Court—Rules of Supreme Court, Order XXXV. *r.* 4; *Order* LXV., *r.* 27, *sub-r.* 41.

In a case in which final judgment had been entered in a district registry, and the taxation of costs had commenced before, and objections had been carried in and dealt with by the district registrar, it was *held*, that, under Order XXXV., r. 4, and Order LXV., r. 27, sub-r. 41, a judge had jurisdiction in the exercise of his discretion to order that the items referred to in the objections should be referred to a taxing master of the Supreme Court for retaxation.

APPEAL from Bruce J. in chambers.

This action was brought for an injunction to restrain the defendant from working a steam-hammer so as to cause a nuisance to the plaintiff and his premises at Cradley Heath, in Staffordshire. It was originally instituted in the Chancery Division, but was transferred to the Queen's Bench Division, and tried at Birmingham, before Pollock B., where judgment was given for the defendant with costs. The costs were taxed before the district registrar at West Bromwich under Order XXXV., r. 4, and the plaintiff, not being satisfied with the certificate, carried in objections to a number of the items in the bill of costs. Some of these items he asserted were not allowable between party and party, and he objected to others on the ground of extravagance in procedure, and particularly in expenditure upon an unnecessary number of expert and other witnesses, most of whom were not called.

These objections were twice disallowed by the district registrar, who in his answers gave his own views as to the great importance of the case to the defendant, and the vast consequences that would ensue to the district if the action had succeeded, giving as his opinion that "the whole of the witnesses were necessary and proper witnesses, and, having regard to the standing and character of each of the witnesses and to

the importance of the case, the several allowances to them were reasonable and proper."

The plaintiff then made application before Bruce J. in chambers to review the taxation, and the learned judge on June 3, 1897, made an order that the items in the defendant's bill referred to in the objections should be referred to Master Butler for retaxation, and that the costs of the application should be reserved.

From this order the defendant now appealed.

Willoughby Williams (with him *Jelf, Q.C.*), for the appellant. This is a case in which taxation has taken place, and the plaintiff should have obtained an order to review, for after taxation the Court has no jurisdiction to order that there shall be another taxation. Where no objections have been carried in the taxation is final; and where objections have been carried in the parties are bound by those objections, and cannot go outside them. By Order LXV., r. 27, sub-r. 39, any party who is dissatisfied with the allowance by the taxing officer of any item in a bill of costs may, before the certificate is signed, carry in before the taxing officer his objections, and the grounds for them, and may apply to the taxing officer to review the taxation in respect of the same; and after the certificate he may, under Order LXV., r. 27, sub-r. 41 (1), within the period, and at the time therein mentioned, apply to a judge in chambers for an order to review the taxation, and the judge may thereupon make such order as he may think just. But the certificate of the taxing master is final and conclusive as to all matters which have not been objected to in that manner.

(1) Order LXV., r. 27, sub-r. 41, is as follows: "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the Court or a judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

C. A. 1897

STEVENS v. GRIFFIN.

And by rule 27, sub-rule 42, the application is to be heard and determined "by the judge" upon the evidence brought in before the taxing master, and no further evidence shall be received unless the judge shall otherwise direct.

Moreover, points not raised in the written objections cannot be raised on a summons to review: *Shrapnel* v. *Laing* (1); Annual Practice, 1897, p. 1189. This would be in effect an appeal from the district registrar to Master Butler, involving a taxation de novo, and destroying the principle of finality.

Crump, Q.C., for the respondents. The district registrar in this case was a man of small experience as a taxing officer, who was impressed with an exaggerated notion of the importance of this case, as his remarks shew, in consequence of which he has allowed extortionate or exorbitant charges. The matter has already been twice before him, and it would have been futile to have applied for a review by him.

It is contended that the taxation can only be sent back to the same taxing officer. But the words of Order LXV., r. 27, sub-r. 41, are in the widest possible terms: "The judge may thereupon make such order as the judge may think just." In this case the taxation was not finally concluded, and the judge did not think it right to send the matter back a third time to the officer who had taken such an exaggerated view of the case. The learned judge might if he had chosen have dealt with it himself, but he thought it just and proper, after consultation with Pollock B. who decided the case, and after taking the opinion of one of the taxing masters, to order the items still sub judice to be referred to a taxing master of greater experience than the district registrar. And the judge had ample jurisdiction to do so. [He referred to *Smith* v. *Buller* (2); *Worsley* v. *Labouchere*. (3)]

W. Williams, in reply.

LINDLEY L.J. The question which has arisen in this case is a little unusual.

It appears that the action, which has reference to a nuisance,

(1) (1888) 20 Q. B. D. 334, at p. 337. (2) (1875) L. R. 19 Eq. 473.
(3) (1893) 28 L. J. (N.C.) 879.

was originally instituted in the Chancery Division; it was then transferred to the Queen's Bench Division, and it was tried at Birmingham, and judgment was given for the defendant. Thereupon this bill of costs was carried in in the usual way, and in the ordinary course was taxed in the district registry. The plaintiff was not satisfied with the certificate, and he carried in objections in writing, which I will not go through in detail. That taxing officer's certificate has been twice sent back—and again I will not refer to the circumstances—and he has given his reasons for adhering to his own view. Then the plaintiff went before Bruce J. in chambers upon these objections, and Bruce J. made the order under appeal. [The Lord Justice then stated the terms of the order, and continued :—]

The ground of the appeal is that the learned judge had no jurisdiction to make that order.

It appears to me that we cannot go the length of saying that he had no jurisdiction to make that order. There are only two rules to which I think it is necessary to refer. The first is Order xxxv., r. 4, which directs that, "where final judgment is entered in the district registry costs shall be taxed in such registry, unless the Court or a judge shall otherwise order." This shews that an order may be made to tax elsewhere the costs which as a rule would be taxed in the district registry. Mr. Williams says that must be construed somewhat narrowly, and we cannot under that uphold an order for retaxing a bill of costs that has already been taxed in the district registry and objected to. I am not disposed to put so narrow a construction on that rule; and I do not see why under that rule, if there was nothing else in it, the learned judge would not have had jurisdiction to do what he has done. He has ordered the costs which have been objected to to be referred to Master Butler for retaxation; and to hold that the learned judge had no jurisdiction to do so, would be to construe the rule too narrowly.

The other rule, Order lxv., r. 27, sub-r. 41, is even wider. [The Lord Justice then read that rule, and continued :—]

Now I have no doubt that Bruce J. was justified in saying,

C. A. 1897

STEVENS v. GRIFFIN.

Lindley L.J.

"Having regard to what I see of this taxation by the district registrar I am not satisfied with it, and I am not disposed to send it back to him. It has been twice before him; what is the use of sending it back? I shall in the exercise of my discretion refer the disputed items to a person who has greater experience." That is a question of discretion. We are not warranted in saying that the learned judge could not do what he has done. Under both those rules, and under the second, if not the first, the learned judge had power to make the order appealed from. Then we do not go into the mode in which the judge has exercised his discretion. As a general rule the learned judge goes over a taxation, and when he sees that a taxing officer has gone wrong as to particular items, the judge can refer the matter to a taxing master of greater experience. It is quite obvious that Bruce J. was not satisfied with the way in which the district registrar had taxed this bill, and he said, "I will take the assistance of a taxing master who has more skill and more experience." I think the jurisdiction was in the learned judge, and it is quite impossible for us to review the mode in which he has exercised it. This appeal must accordingly be dismissed with costs.

CHITTY L.J. I am of the same opinion. I think the learned judge had jurisdiction under Order XXXV., r. 4. I do not read the words at the end, "unless the Court or a judge shall otherwise order," to mean that the order must be made at the trial. I think it can be made separately, and be made after judgment, and after taxation has commenced, because I do not agree with Mr. Williams that this taxation is final. It is final as to certain items, but it is still sub judice as to the matters referred for retaxation. Then I turn to Order LXV., r. 27, sub-r. 41, and I think we should not be justified in cutting down the meaning which I think is clear on the face of the rule itself. Rule 27, sub-rule 41, says, "make such order as the judge may think just." I conceive it would be an impossible reading of that rule to say the judge had not jurisdiction to make such an order as this. It is a question of taxation. The judge is at liberty to consult the taxing master on the subject. It is a

mere question of convenience whether he shall see the taxing master personally or remit the matter to him. Where there are grounds—and there are primâ facie grounds here—for saying the allowance on taxation is excessive, then the learned judge can either take the matter into his own hands, or do as Bruce J. has done—get such assistance as he can derive from a skilled and experienced man.

C. A. 1897

STEVENS v. GRIFFIN.

Chitty L.J.

Appeal dismissed.

Solicitors: *Charles Robinson & Co., for William Waldron, Brierley Hill, Staffordshire; Frith Needham, for James Clark, West Bromwich.*

W. W. K.

[IN THE COURT OF APPEAL.]

C. A. 1897 *July* 19, 21.

ATTORNEY-GENERAL *v.* DODINGTON.

Revenue—Estate Duty—Exemption—Settlement of Personal Property—"Disposition"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 21 *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property" probate duty (among other specified duties) "has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." Under a marriage settlement personal property belonging to the wife became vested in trustees upon trust for the wife for life, and, after her death, if her husband should survive her, upon trust for the husband for life, and, after the death of the survivor of them, upon trust for such person or persons as the wife should by deed or will appoint. The wife died in the lifetime of her husband before the commencement of the Finance Act, 1894, having by her will appointed the property in favour of certain beneficiaries, and probate duty was thereupon paid by her executors in respect of the value of the property so appointed after deducting the value of the husband's life interest. The husband died after the commencement of the Act:—

Held (affirming the decision of Vaughan Williams and Wright JJ.), that the settlement and will together constituted a "disposition" by which the property was settled within the meaning of s. 21, sub-s. 1, and

C. A.
1897
ATTORNEY-GENERAL v. DODINGTON.

therefore that estate duty was not payable on the husband's death in respect of the value upon which probate duty had been paid.

By Rigby L.J.: *Semble*, estate duty was not payable on the amount of the value of the husband's life interest, probate duty having been paid on the whole of the property.

APPEAL from the judgment of a Divisional Court (Vaughan Williams and Wright JJ.), reported [1897] 1 Q. B. 722, upon an information by the Attorney-General claiming estate duty.

By an indenture of settlement dated October 16, 1871, in consideration of the marriage then intended to be and shortly afterwards solemnized between the Rev. William Popham and Mrs. Bailward, widow, certain personal property to which the latter was then entitled in reversion expectant on the death of her aunt Mrs. Manning was settled upon trust for the wife for life for her separate use, and, after her decease, in case the husband should survive her, then upon trust for the husband for life, and, from and after the decease of the survivor of them, upon trust for such person or persons as the wife might by deed or will appoint, and, in default of such appointment, in trust for the wife, her executors, administrators, and assigns, to the intent that the same, but subject nevertheless to the life interest therein of the husband, might be her separate property for her sole and separate use. (1)

Mrs. Manning died in 1874, and Mrs. Popham's reversionary interest thereupon fell into possession. Mrs. Popham died in August, 1883, in the lifetime of her husband. At and after her death the trust funds remaining subject to the trusts of the marriage settlement consisted of 3791*l.* invested partly in India 4 per cent. stock and partly on a mortgage. By her will made in 1883, in pursuance of the power of appointment, Mrs. Popham appointed that from and after her decease the trustees of the settlement should stand possessed of the trust funds, as to 300*l.* upon trust for her husband, and as to the residue, subject to his life interest, upon trust for her children by her first marriage absolutely in certain shares. Upon her death the executors of her will duly paid probate duty under

(1) The settlement is more fully set out in the report of the case in the Court below, [1897] 1 Q. B. 722.

the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), on the sum of 2855*l.* as being the value of the interest in the trust funds disposed of by her will after deducting a sum of 936*l.* calculated as the actuarial value of the life estate of her husband. The husband died on August 28, 1894, after the commencement of Part I. of the Finance Act, 1894 (57 & 58 Vict. c. 30), and thereupon the Commissioners of Inland Revenue claimed estate duty under ss. 1, 2 of that Act upon so much of the trust funds as remained subject at his death to the trusts of the marriage settlement.

The defendant, who was the surviving trustee of the marriage settlement, refused to pay such estate duty, claiming that the trust funds were exempted therefrom by s. 21, sub-s. 1, of the Finance Act, 1894. (1)

The informant prayed that (inter alia) "it might be declared that upon the death of W. Popham estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the trust funds remaining subject to the indenture of October 16, 1871, which passed on his death within the meaning of the said Act."

The Divisional Court gave judgment for the Crown for estate duty only on the amount of 936*l.* as being a part of the property upon which probate duty had not been paid. (2)

The Crown appealed.

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) (*Vaughan Hawkins* with them), for the Crown. Estate duty is payable upon the principal value of the whole of the personal property subject to the trusts of the settlement at the death of the husband, namely, upon 3791*l.*, unless the exemption in s. 21, sub-s. 1, of the Finance Act, 1894, applies to this case. That amount was property which passed on his death within the meaning of s. 1 and s. 2, sub-s. 1 (*b*), of the Act, because, upon his interest ceasing, the absolute interest in the trust funds accrued to the

(1) The material sections of the Act are set out in the report of the case in the Court below.

(2) See the report of the judgments, [1897] 1 Q. B. 736, 737.

C. A. 1897

ATTORNEY-GENERAL v. DODINGTON.

appointees. It is not merely the interest ceasing on the death of the deceased, but the whole property, which in this case is to be deemed to pass under s. 2, sub-s. 1 (*b*), on the death of the husband. That sub-section fixes the time at which the settled property is to be deemed to pass. Sect. 2, sub-s. 1 (*c*), shews that the liability to estate duty arises in respect of the passing of the property itself, not of a particular interest in it; and s. 7, sub-s. 7, shews that it is the principal value of the property which on the cesser of the life interest becomes taxable. The sole question really is whether this case is within the exemption created by s. 21, sub-s. 1. This is not a case in which probate duty has been paid in respect of "personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act" within that sub-section. To bring a case within the sub-section there must have been a will or disposition by which the property was originally settled, and in respect of which probate duty in the case of a will, or account duty in the case of a disposition, has been paid on the whole of the property so settled. This property cannot be considered to have been settled by Mrs. Popham's will. Regarded as an exercise of the power of appointment under the settlement, it merely designates the persons who take under the settlement; it is not an instrument settling the property within the definition of "settlement" given by s. 22, sub-s. 1. Owing to the accident that Mrs. Popham exercised the power of appointment by will and not by deed, probate duty became payable under 23 & 24 Vict. c. 15, s. 4, in respect of the disposition of her particular interest in the property; but probate duty was not payable on the settlement as such. It is on the passing of the settled property itself, not of a particular interest in it, that estate duty is payable. But, subject to her husband's life interest, Mrs. Popham had the whole beneficial interest in the property, and her will must be looked upon as in substance taking effect by virtue of her right of property and not by virtue of the settlement. It must be looked at as a disposition of property, the disposition of which was left in her notwithstanding the settlement, and as having really no dependence upon it, but taking effect after

its force was exhausted. It would be drawing too fine a distinction to rely on the fact that in form the will purported to be made in exercise of the power. Unless the will forms part of a disposition by which the property was settled the case cannot come within the sub-section.

The meaning of the term "disposition" as used in s. 21, sub-s. 1, must be limited by reference to the previous term, "will." The disposition contemplated by the sub-section is a quasi-testamentary disposition within the purview of s. 38 of the Customs and Inland Revenue Act, 1881, and the Customs and Inland Revenue Act, 1889, s. 11, upon the property disposed of by which account duty has been paid. It is contended that the scope of s. 21, sub-s. 1, is this. In cases where, property having been settled by the will of or a quasi-testamentary disposition by a person dying before the Finance Act came into operation, probate duty or account duty, as the case might be, had been paid on the whole property, it was deemed unjust that estate duty should become payable on the lapse of a life interest under the settlement after the Act. The introduction of the words "made by a person dying before the commencement of this part of this Act" points to the conclusion that "disposition" means a disposition of a quasi-testamentary nature on which account duty was payable, for otherwise those words would be meaningless. In this case probate duty has not been paid on the whole of the settled property, but only on Mrs. Popham's interest. The words in s. 21, sub-s. 1, "in respect of which property" shew that the duty must have been paid in respect of the whole settled property in order to render the exemption applicable. If the defendant's contention is right, and the exemption applies, it would follow that the Crown is not entitled even to the estate duty on the 936*l.*, the value of the husband's life interest, for which the Crown obtained judgment in the Divisional Court. If the Crown is not entitled to the duty on the whole by reason of the case being within s. 21, sub-s. 1, and the exemption applying, then the result would seem to be that it is not entitled to duty on the part. This cannot be the effect of the sub-section.

Haldane, Q.C., and *Danckwerts*, for the defendant. The

C. A. 1897

ATTORNEY-GENERAL v. DODINGTON.

scope of s. 21, sub-s. 1, is that, where probate duty has been once paid on the property settled by any will or other disposition, the Crown is not to be entitled to estate duty upon it as long as it continues in settlement. The appointment by Mrs. Popham's will became under 23 & 24 Vict. c. 15, s. 4, subject to probate duty. Probate duty was really paid on the whole of the property in settlement. The interest of Mrs. Popham being subject to her husband's life interest, the executors had an option either to pay the duty at once, or to wait until the death of her husband. In the former case they would get an allowance in the nature of discount in respect of the life interest; in the latter case the duty would be calculated on the full amount. In either case the duty would be paid on the whole of the property. The meaning of the word "disposition" cannot be limited to quasi-testamentary dispositions as suggested by the Crown, but includes all dispositions. The section specifies wills, because in the great majority of cases the disposition would be by will, but that affords no ground for limiting the generality of the subsequent word "disposition." In this case the settlement and appointment by will under it together constituted a disposition by which the property was settled within the sub-section. If that be the interpretation of the sub-section, as contended for by the defendant, it fits in exactly with the analogous provision of s. 5, sub-s. 2, which provides that, when estate duty has once been paid in respect of settled property, it shall not be payable again so long as the property continues in settlement.

The Solicitor-General, in reply.

LORD ESHER M.R. We must, in the absence of special reason to the contrary, construe the words of the enactment upon which this case depends according to their ordinary grammatical sense, so far as it is possible so to construe them with regard to the subject-matter, and then apply them to the case in hand. In this case Mrs. Popham upon her marriage made a settlement of personal property in such a form that it might be carried into effect with regard to particular persons by an appointment made by will. The question is whether the case

comes within s. 21, sub-s. 1, of the Finance Act, 1894. That sub-section provides that "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act in respect of which property any duty mentioned in paragraphs 1 and 2 of the 1st schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." The question that arises is whether in this case the property can be said to have been settled by a "disposition" within the meaning of the sub-section. I cannot see any reason for restricting the meaning of the term "disposition" as used in the sub-section to a particular kind of disposition as suggested on the part of the Crown. In this case there was a settlement of property by a disposition of a peculiar kind, namely, by a settlement in favour of such persons as Mrs. Popham might appoint by will, and by the appointment made by the will of Mrs. Popham under that settlement. It appears to me that that is a disposition made not by the will alone, but by the settlement and will taken together; and by reason of the disposition being made in that peculiar way probate duty became payable to the Crown. I can see no reason for holding that such a disposition is not one of the dispositions that come within the sub-section. Therefore it seems to me that the case is within the very terms of the sub-section, and that the present attempt is to make the defendant pay estate duty in respect of property in respect of which probate duty has already been paid, which is what the sub-section is intended to prevent. I agree with the view taken by Vaughan Williams J. in the Court below, to the effect that the exercise of the power of appointment ought to be referred to the instrument which created it, and that the property was settled by a disposition within the meaning of s. 21. For these reasons I think the appeal should be dismissed.

C. A. 1897

ATTORNEY-GENERAL v. DODINGTON.

A. L. SMITH L.J. I am of the same opinion. A strenuous effort has been made to cut down the provision in favour of the subject contained in s. 21, sub-s. 1, of the Finance Act, 1894, and to make the same settled property, which has already paid probate duty, subsequently liable to estate duty, which appears to me to be altogether contrary to the intention of the Legislature as expressed in the sub-section. In this case Mrs. Popham upon her marriage settled certain personal property upon trust for herself for life, with remainder to her husband for life, and, subject thereto, upon trust for such person or persons as she might by deed or will appoint, and in default of appointment on trust for herself for her separate use. She made an appointment of the property by her will under the power so reserved to her, and died in 1883 before the passing of the Finance Act, 1894. Upon her death, the estimated value of the trust funds being 3791*l.*, and the actuarial value of the husband's life interest being calculated to be 936*l.*, the executors paid probate duty on the sum of 2855*l.*, being the amount of the trust funds after the deduction of the value of the husband's life interest. I think the question whether they paid probate duty on the whole property immaterial for the purposes of the present appeal. The husband being now dead, the Crown claims duty, not merely on 936*l.* the value of the husband's life interest, but on the whole amount of the trust funds including the sum of 2855*l.* which has already paid probate duty. I think that the contention for the Crown is wrong. The question entirely depends on the construction of s. 21, sub-s. 1. It is clear that that sub-section read according to the ordinary grammatical meaning of the words used in it applies to the present case. The paramount object of the sub-section appears to me to be that settled property should not pay the two duties, namely, first probate duty and then estate duty. I agree with the view taken in the Divisional Court, and put forward in this Court by the defendant's counsel, namely, that in this case the settlement and the will together constitute a disposition; and by reason of the disposition being carried out by an appointment by will the Crown has obtained probate duty on 2855*l.* I do not think that the meaning of the word "disposition" in

the sub-section is limited to quasi-testamentary dispositions as suggested for the Crown. I read the sub-section, as I think it ought to be read, in its largest sense in favour of the subject, and as meaning that, if there is personal property settled by any will or disposition made by a person dying before the commencement of the Act, in respect of which any duty mentioned in paragraphs 1 and 2 of the schedule has been paid, then the estate duty shall not be payable. It seems to me that this case comes exactly within the words of the sub-section.

RIGBY L.J. I am of the same opinion. The scheme of the Finance Act, 1894, is by the very general provisions of ss. 1 and 2 to sweep into the net almost everything that can in any sense be said to pass on a person's death. The Act, however, expressly provides for certain exemptions; and the defendant in the present case contends that he is within the exemption created by s. 21, sub-s. 1. That is a sub-section which does not deal with property in general, but only with settled property, by which, in my opinion, must be meant property which at the time in question is actually under "settlement," a term which by s. 22, sub-s. 1, is to have a very wide application. The provision is that, if it happens that in respect of personal property settled by a will or disposition made by a person dying before the commencement of the Act either of the duties referred to in paragraphs 1 and 2 of the 1st schedule to the Act has been paid or is payable, then the right of the Crown to claim estate duty shall be excluded. It seems to me that there is only one portion of the sub-section which can fairly be said to need interpretation, and that is the expression "settled by will or disposition." The law officers of the Crown seek to cut down the meaning of the term "disposition." They say, and I think rightly say, that the property here in question cannot be said to have been settled by the will of Mrs. Popham; and they seek to say that the term "disposition" only refers to such dispositions as those upon which account duty would have been payable under s. 38 of the Act of 1881. I can see no ground for cutting down the meaning of the term "disposition" as suggested. The only possible ground for the suggestion is its

C. A. 1897

ATTORNEY-GENERAL v. DODINGTON.

Rigby L.J.

association with the word "will." But I think the counsel for the defendant gave a sufficient answer to that argument by pointing out that in other parts of the Act words are introduced which are not really absolutely necessary in order to make certain common cases quite plain. The word "will" does include the great majority of cases in which probate duty is payable, and I think that that is a sufficient explanation why it was introduced, and that the use of the word affords no sufficient ground for cutting down the meaning of the general term "disposition" which follows it. In the present case, by a settlement made in 1871, the lady who became Mrs. Popham settled certain personal property upon trust for herself for life, and after her death, if her husband survived her, upon trust for him for life, and, after the death of the survivor of them, upon trust for such person or persons as she should by deed or will appoint, and, in default of such appointment, for herself, for her separate use. The testamentary instrument executed by Mrs. Popham expressly purported to be made in the exercise of the power of appointment created by the settlement. It appears to me clear that, taking the settlement and the testamentary appointment together, they constituted a "disposition" of the property in the ordinary sense of the term; and by virtue of that disposition probate duty became payable and was paid. It was argued for the Crown that it would be going on very fine lines to distinguish between a will purporting to be made under the power and one not purporting to be so made. That may be so, and, if on some future occasion it is sought on the part of the Crown to say that there is no exemption under s. 21, sub-s. 1, because a will does not expressly refer to the power of appointment, the argument may perhaps be turned against them. However, I will say nothing as to that. In the present case the appointment was clearly made under the power, and under the provisions of the Probate Acts then in force the property so appointed became the subject of probate duty. The duty became payable not on part of the property, but on the whole of it, just as if it were reversionary personal property purchased by the testatrix. As a matter of fact the duty was not calculated on the whole amount of the property

for a simple reason which often occurs in such cases. The interest of Mrs. Popham was a reversionary interest, and did not fall into possession at once, and a very usual course was adopted, which has been sanctioned by cases in the Chancery Division which have never been questioned; that is to say, the present value of the property on which probate duty was payable was estimated by calculating the value of the husband's life interest according to actuarial tables, and subtracting it from the total value of the property. That does not mean that only part of the property or a partial interest under the settlement was charged; the probate duty was charged on the whole of the property subject to the settlement. If the payment of the duty had been delayed as frequently happens till the death of the husband, when the property came into possession, then, within the plain words of s. 21, sub-s. 1, the duty on the whole of the property would have become payable. It is impossible, I think, to distinguish between a case where the duty has been, as it were, compounded for, or an arrangement made for its earlier payment on the death of the settlor and a case where the duty has not actually been paid but is payable in full. My conclusion is that in the present case the defendant brings himself within the very words of the sub-section, and I entertain no doubt that his case comes within the intention of the Legislature in framing it. I think that their intention looked at broadly was that in the case of settled property, where probate duty has once been paid or become payable in respect of the interest of the settlor in it, that should be as effectual for the purpose of exempting the property from payment of the estate duty, as under s. 5, sub-s. 2, the fact that estate duty has once been paid on settled property is for the purpose of preventing a second duty from being payable. It was felt that the case of property in settlement required great consideration, and that it would be a hardship in the case of such property that, when estate duty had once become payable in respect of it, it should again be payable on the lapse of each life, and that the same consideration applied to the case of settled property on which probate duty had once been paid or become payable. Accordingly the one case is provided for by s. 5,

C. A. 1897

ATTORNEY-GENERAL v. DODINGTON.

Rigby L.J.

sub-s. 2, of the Act, and the other by s. 21, sub-s. 1. I feel bound to add that I think this result follows—because I cannot otherwise arrive at a satisfactory decision in my own mind—namely, that the suggestion made by the Attorney-General that, if the claim of the Crown be wrong as to the duty on the whole of the estate, it must be wrong as to the duty on the part is correct; but there is no cross appeal on that point. It seems to me that the argument is unanswerable that, if the estate duty is not payable on the whole of the trust funds, it is not payable on any part of them, the probate duty having already been paid on the whole. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Flower, Nussey & Fellowes.*

E. L.

1897
April 10.
C. A.
May 19, 20.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* MAYOR AND CORPORATION OF NEWCASTLE-UPON-TYNE.

Practice—Discovery—Information—Production of Documents—Right of the Crown—Crown Suits, &c., Act, 1865 (28 & 29 *Vict. c.* 104), *ss.* 13, 14, 15, 16—*Rules of Court for Regulating the Procedure and Practice in Suits by English Information* (*Easter Term*, 1866), *rr.* 4 (1), 5 (5).

By information in the Queen's Bench Division (Queen's Remembrancer's side) against a corporation, the Attorney-General on behalf of the Crown claimed a declaration that the foreshore and bed of a river within certain limits belonged to the Crown. The defendants by their answer claimed to be owners of the same foreshore and bed, within the limits of a port and including the part claimed by the Crown, and to be also conservators of the river; and they set out a list of documents relating to the part claimed by the Crown, and alleged that they had no other relevant documents. The Crown did not except to the answer within the time limited by the Rules of Easter Term, 1866:—

Held, that the Crown had the same right of discovery against the corporation as a subject had against a subject in an ordinary action, and that the omission to except to the answer was no bar to such right:

And *held* further, that the Crown was entitled to discovery not only of the documents relating to the parts of the river claimed by the information,

but also of anything which might tend to shew that the defendants were not absolute owners of the foreshore and bed of the river to the extent which they claimed to be, including all their acts of ownership as conservators or otherwise, and the documents relating thereto.

The principles of *Attorney-General* v. *Corporation of London*, (1850) 2 Mac. & G. 247, and *Attorney-General* v. *Emerson*, (1882) 10 Q. B. D. 191, applied.

APPEAL from an order of Wills J. directing the defendants to make a further affidavit of documents.

This was an information in the Queen's Bench Division (Queen's Remembrancer's side), by the Attorney-General on behalf of Her Majesty, against the mayor, aldermen and citizens of the city and county of Newcastle-upon-Tyne, and against Hill Motum, the town clerk of Newcastle-upon-Tyne, who was made a party thereto for the purpose of discovery, claiming a declaration that the foreshore and bed, as far as mid-stream of the River Tyne, opposite to the manors of Gateshead and Whickham respectively, and within certain limits, were vested in Her Majesty the Queen, her heirs and successors, as part of the hereditary revenues and properties of the Crown, subject to such leases on behalf of Her Majesty as were now in force, and that the title and possession of Her Majesty and of her lessees and grantees might be quieted against the defendants the corporation.

The informant filed interrogatories for the examination of the defendants.

The defendants by their answer claimed to be owners of the whole of the foreshore and bed of the Tyne within the limits of the port of Newcastle, including the part claimed by the Crown; and, setting out a list of documents and parts of documents as relating to the matters in question, they alleged that they had no other documents relevant thereto. The defendants were also Conservators of the River Tyne.

The informant did not except to the answer put in by the defendants within the time limited by the rules under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), of Easter Term, 1866: see L. R. 1 Ex. 389; L. R. W. N. (1866) p. 177, but moved before Wills J. for liberty to inspect the whole of the documents of which parts only were scheduled to the answer,

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

upon the ground that the defendants had no title to the foreshore at all, but were only conservators of the river; and he contended that he was entitled to discovery as to the title of the defendants to the whole of the foreshore claimed by them, and as to their acts as conservators, and that the discovery offered by them was insufficient, being confined to documents relating to the manors of Gateshead and Whickham.

On April 10, 1897, upon this motion, Wills J. made an order that the defendant Hill Motum should within twenty-eight days make and file a full and sufficient affidavit, stating what documents relating to the matters in question in the cause the defendant corporation had or had had in their possession or power, and accounting for the same, and, as to any document or entry which the defendants might object to produce, stating the facts on which the defendants relied to shew that the informant was not entitled to inspect the same.

From this order the defendants now appealed.

Robson, Q.C., *Graham*, and *Stuart Moore*, for the appellants. The appellants have disclosed all entries relating to the part of the foreshore claimed by the Crown. The Crown claims production of all the books of the corporation. Its right to discovery depends on The Crown Suits, &c., Act, 1865 (28 & 29 Vict. c. 104). The Crown lays claim to the foreshore of two manors on the left bank of the Tyne. The corporation have been conservators of the river from time immemorial, and also claim the foreshore of these two manors. The Crown has no right to claim inspection of any entries which relate neither to the river as a whole nor to this particular part of the river. The corporation resist the application of the Crown on the broad ground that a plaintiff cannot call for production of documents not relating to the property to which the suit relates in order that he may find flaws in the title of the defendant to property other than that to which the proceedings relate. The informant is not entitled to discovery of the general title of the corporation. If this order stands, it will be necessary to institute a search which will last about nine months, and to make it extend back for hundreds of years. This is nothing

more than a fishing attempt to go through documents for the purpose of discovering something to help the informant on some part of the river other than that now in question. The appellants are at a disadvantage, because while discovery cannot be compelled by them as subjects against the Crown, the Crown can always claim discovery against the subject.

But in the present case the Crown has to meet the difficulty that, according to the practice, an objection on the ground of insufficient discovery ought to be taken by way of exception to the sufficiency of the answer put in by the defendants. No such exception was taken within the six weeks limited by the Rules under the Crown Suits Act, 1865, in that behalf, i.e., rules 4, sub-rule 1, and 5, sub-rule 5, and consequently the right of the Crown to further discovery is barred, and the Court had no jurisdiction to make the order appealed against: Fowler's Exchequer Practice, p. 354.

Sir R. E. Webster, *A.-G.*, and *Vaughan Hawkins*, for the respondent. An offer has been made on behalf of the Crown to give the appellants the same discovery as they would have been entitled to if the litigation had been between subject and subject.

It is said that the Crown's right to further discovery is barred because no exception was taken to the sufficiency of the answer. But there is in fact no such rule. In the matter of discovery the Crown and a subject litigating together are precisely on the same footing as ordinary parties: *Attorney-General* v. *Corporation of London* (1); *Attorney-General* v. *Emerson*. (2) If it appears that the documents may probably relate to the case of the informant (as it does here), it is not enough for the defendants to say generally that they relate only to other parts of the river, or to their duties as conservators, and to refuse to produce them on that account. The defendants claim the whole foreshore and bed of the river within the limits of the port, and are also conservators of the river; and it may be of vital importance to the Crown to know what documents they possess, and what acts of ownership they have done as conservators or otherwise with reference to the foreshore and bed outside what

(1) 2 Mac. & G. 247. (2) 10 Q. B. D. 191.

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

is claimed by the Crown. The objection as to the omission to except is purely technical, and it was not open to the informant to except, because the answer upon the face of it was perfectly good. But neither the sufficiency of the answer in point of form nor the omission to except prevents the Court from ordering a further affidavit where there is a reasonable suspicion that the defendant has not made sufficient discovery: *Noel* v. *Noel*. (1) At most the objection is one which might be got rid of by amendment, and the Court will not nowadays require that formality to be gone through.

The practice which has subsisted for upwards of 100 years, and ought not to be disturbed, shews that in a case like this the circumstance that the answer has not been excepted to has no effect whatever upon a plaintiff's or an informant's right to inspection or discovery, and there can be no doubt that the Court had full jurisdiction to order a further affidavit, and that this is the least that the Crown is entitled to: 1 Fowler's Exchequer Practice, ed. 1817, pp. 49, 50; Wigram on Discovery, pp. 199, 200.

Graham, in reply.

LOPES L.J. I am of opinion that the order of the learned judge in the Court below, dated April 10, 1897, ought to be maintained. [The Lord Justice then read the order, and continued:—]

In my opinion that was as lenient an order as the learned judge, in the circumstances of the case, could make. Amongst other things, it was urged on behalf of the appellants that they had a grievance; for while on the one hand discovery could not be compelled from the Crown, on the other hand the subject was bound to discover. That grievance was entirely removed by the statement at once made by the Attorney-General that this practice would not govern the present case, and that the Crown would afford the same discovery in this case as a subject would be entitled to in a suit between subject and subject. Then the point was taken and strenuously urged that there was no jurisdiction to order dis-

(1) (1863) 1 De G. J. & S. 468.

covery in this case because the answer had not been excepted to. It was contended that the answer ought to have been excepted to within six weeks; that the time had expired without its having been excepted to; and, therefore, that there was a bar to any further discovery. I do not think that that contention can be for one moment maintained. In the first place, it is a technical objection, because the information might be amended, and the difficulty might be got rid of. But the objection is not maintainable. In my view the right of the Crown to discovery against a subject is the same as in a suit between subject and subject, and I cannot think that that right can be taken away by the fact that the six weeks' time for excepting to the answer has been allowed to expire. There is very strong authority in favour of what I have said. There is the long practice. I am not so familiar with those matters as my learned brother who sits by my side, but I am told that a long practice has prevailed extending over a hundred years to the effect that discovery can be granted in a case like this notwithstanding there has been no exception to the answer. There are two cases which have been referred to, one, *Attorney-General* v. *Corporation of London* (1), and the other, *Attorney-General* v. *Emerson* (2), they are strong authorities in favour of that point. I come, therefore, to the clear conclusion that there is jurisdiction to order discovery in this case.

But a further point arises with regard to the merits; and the line which appears to have been taken by the defendants is this. They say, all that is claimed by the information is the foreshore to two manors, and all that we can be called upon to discover are documents and acts of ownership relating to those two manors; and if we have any other documents, or if there are any other acts of ownership which relate to other portions of the River Tyne, we cannot be called upon to discover those. I think there the town clerk has acted on a wrong principle. Directly you get to the "unum quid" (3), which you do in this case—I mean by unum quid a stream or common, whichever it may be—other acts of ownership on other parts of the common or

(1) 2 Mac. & G. 247, at p. 268. (2) 10 Q. B. D. 191.
(3) *Neill* v. *Duke of Devonshire*, (1882) 8 App. Cas. 135, 151.

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

Lopes L.J.

of the river, as the case may be, are admissible as evidence, and are subject-matter of discovery by the opposite party, because they are acts which more or less may go, and very often do go, to repel the title which is set up by the defendant.

Now it is most material in this case to bear in mind what the defendants do claim. They claim in their answer to be owners of the whole of the foreshore and bed of the River Tyne within the limits of the port of Newcastle, and they also are Conservators of the River Tyne. And what the Crown desires is to have discovery of any documents or acts of ownership which relate to other parts of the River Tyne outside the foreshore of those two manors, and also any acts of ownership or documents which have anything to do with their position as Conservators of the River Tyne. It appears to me that they are clearly entitled to discovery of such matters.

The rule was very well put, if I may say so, by Parke B. in *Jones* v. *Williams* (1), where he says: "Evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did." I think that is applicable to the present case.

With regard to anything done by the defendants as conservators, it appears to me that there may be acts and documents relating to them as conservators which it may be most material for the Crown to have discovery of for the purpose of determining what the nature of those acts or the character of those documents may be. I mean by that whether they are acts referable to their agency as conservators, or whether they are acts referable to their being the owners of the soil. There are acts which may be done by conservators such as (taking a case which was put to us by the Attorney-General) the erection of a pier, or the creating an obstruction in a river which might, if they were not conservators, be a most formidable act of ownership, but which might be qualified or accounted for, so as not to be of any value as proving ownership of the soil, if those same things were done by the defendants in their character

(1) (1837) 2 M. & W. 326.

of conservators. I think, therefore, it is most material that discovery should be made of those matters.

In my opinion, the order of the learned judge in the Court below is perfectly right, and I think the Crown are entitled to see all such documents as I have alluded to which repel the defence which has been set up by the defendants—I mean documents which have anything to do with the soil of the bed of the river.

I think the appeal ought to be dismissed.

RIGBY L.J. I am of the same opinion. First, on what I may call the point of procedure, it is suggested that because there was an Act of 1865 followed by the rules of the next year, 1866, with regard to the procedure in Crown suits, unless you can find in black and white in that Act something pointing to the particular procedure here, you cannot have it at all. I do not agree with that in the least. The particular rule which is insisted upon is that with regard to exceptions to answers. The time given for exceptions is six weeks. Well, with regard to this individual case, it appears to me that whether the time is six weeks, six months, or six years, is of very little importance, because the answer could not have been excepted to. It is as good an answer in point of form as could possibly have been required. The question was as to the documents relating to the subject-matter of the suit in the possession of the defendants. The answers are strictly correct in point of form; and, assuming them to correspond with the facts (I am not suggesting that there is any departure from the truth), the answer is unexceptionable.

Therefore, the contention must really come to this: that if the defendants to an information have brought themselves by what I will assume to be an honest process of reasoning up to the mark of saying, "We have these documents and no others," there is an end for ever in that suit to any claim for further discovery to be obtained from them. I think that is altogether unreasonable. I think it altogether in opposition to what has been the substantial practice, first of all, as laid down in Wigram V.-C.'s well-known book on Discovery, and then,

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION

Rigby L.J.

as I understand, in the work of Mr. Fowler on the Exchequer Practice especially. I confess I have not gone very carefully into that, because I do not think at this time of day we are entitled to do so. I think we are bound by the authority of cases in this court, which we cannot take upon ourselves to overrule, even if we thought they were wrong, but as to which, for my part, I do not doubt that they were perfectly correct. I need only refer to the case of *Attorney-General* v. *Emerson*. (1) There, under circumstances which were practically the same as we have in the present case, exactly the same kind of relief by way of discovery was given as by the order which we are asked to reverse.

Let us look at the thing broadly. Originally all the discovery which you could get from a defendant to an information or to a bill was what you could get on the face of your answer at some time or other, and by some means or other. That was a monstrous hardship on both parties; but if the defendant did not somehow or other satisfy the plaintiff, he had to go the length of writing out in his answer the contents of all the documents that he had. It was a monstrous thing, of course, and could only, even in those days, have been necessary by reason of some obstinacy on the part of the defendant in not making discovery, and practically giving the plaintiff what he wanted. That was, of course, done away with; and then by degrees there came in this sort of practice. If the answer were insufficient, it had to be excepted to; but if it were not insufficient, what then? Well, originally, I believe, the proper way was to amend your information and add further interrogatories which then would be in the information as amended, and get a sufficient answer to that.

But it is plain that long, long ago, and as far as we can make out by the beginning of this century, to fix it at the most recent date, that cumbersome method—which would act with such hardship to defendants by creating large additional costs which ultimately they might have to pay—was thrown over for the simpler method of moving for production of documents. Then you had to deal with the question on the same principles that

(1) 10 Q. B. D. 191.

you would have done as to the answer being sufficient or insufficient. Very likely; but certainly there has been established to that strict rule one important exception, that if it appears in any way to the satisfaction of the Court that the answer to the information, or, as in the case of *Attorney-General* v. *Emerson* (1), the affidavit of documents (a much more convenient and equally precise way of dealing with the matter, which is the modern substitute), although in point of form perfectly good, had been sworn under the influence of a material misapprehension as to what ought to have been discovered, then the Court will go behind that, and will order production of those things which ought to have been in the affidavit or in the answer, prepared and sworn according to the proper view as to what ought to have been produced.

I cannot imagine that we are bound in the circumstances (and after *Attorney-General* v. *Emerson* (1) I do not think we are at liberty) to go back and say you shall have the more cumbersome method of amending the information, and so on. I cannot think that it was possible in this case to except, and I think that the present application, which although not strictly in the form of a motion, is a modern equivalent for it—is a perfectly correct application in point of form under the circumstances. It appears plainly from the affidavits that Mr. Motum the town clerk and Mr. Sanders, in preparing their answer and in producing documents under it, were going on a misconception; at any rate, I come to the conclusion that it was a misconception. What was that misconception? That they were under no necessity to produce any instances of acts of ownership with reference to any part of the bed of the river other than that which was immediately put in issue by the claim of the plaintiff in the information. And I think it was also a misapprehension, that where they had acted as conservators and as conservators only, whatever might be the nature of the acts which they had done professing to act in that capacity and in that only, they were not bound to produce any evidence as to what they had done with regard to the bed or soil of the river.

(1) 10 Q. B. D. 191.

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

Rigby L.J.

But now with regard to the merits. In this case no doubt the Crown are claiming only the foreshore opposite to two manors on the south side of the river—that is the right bank, I presume, usque ad medium filum. That is all they claim. But what is the defence which is set up by the corporation? They say, "We are the owners of the whole bed of the river from one end of the port to the other." Well, if they are, then the Crown cannot be owners of this part, and they must fail. Their defence is that they are owners of the whole including this part; that they are owners of this part because they are owners of the whole; and if they cannot make out that they are owners of the whole, they cannot make out that they are therefore, as owners of the whole, owners of this part. That is their defence. What is the right on general principles of a plaintiff or of an informant in cases of this sort? It makes no difference practically. He has a right to discovery of everything that will make out his case: no one doubts that; but he has a right to a great deal more. He has a right to discovery of everything that will make out, or tend to make out, that the defence set up is not a good defence. In other words, in this case he has a right to discovery of anything which will or may tend to shew that they have not got an absolute ownership of the whole bed of the river within the limits of the port, including those manors, which they set up. Now, when we consider discovery from that point of view, it does not in the least matter whether these acts of ownership are on this particular part of the river, or are acts of ownership in any other part of the river. The informant can say, "You have not got that title which you set up as your defence"; and it appears to me, both upon principle and upon authority, that they are entitled to have discovery of every act of ownership which was exercised, in order that the Crown may see under what circumstances those acts of ownership were exercised, and may have the opportunity of investigating whether they do not contain elements which will go to defeat the title to the whole bed of the river, which is the defence that is set up.

As regards the conservators, they are in that sense, I suppose, the agents of the Crown. They act under a charter or some-

thing of the sort, and it may very well be, as is pointed out by my brother Lopes, that they do a great many things as conservators which would be utterly unjustifiable if they were not conservators, and yet which conservators might do although they were not owners. I think it is very important indeed that the informant should have the opportunity of distinguishing what acts those were, and saying, "I cannot take the opinion, however honest, however well supported by other legal opinions, of gentlemen who represent the corporation in this case; but from the nature of the case the informant ought to be able to see what the matter is in order to judge for himself."

I think that covers the whole ground; but I will say a word on one or two other matters.

On the question of hardship, and so on, all that the Court has to do is to investigate the state of the law; and if for some reason known to the Crown it had been against the public interest in this case to produce documents, even then I should say, I cannot help it; I have got to administer the law; the law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. I may say that in these days the prerogative of the Crown is about equivalent to the rights of the public, and therefore there is nothing so very hard in it; but in this case, as we have heard, no attempt has been made to depart from the practice that to my knowledge has existed for many years past; and my experience goes a long way back, though my own tenure of office as a law officer was only a short one. Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded. Then there is no hardship.

Then something was said about having a quo warranto judgment. I do not trouble to read very carefully the sentences in the answer, because I know so well it does not matter. If you want to prevent discovery you must not answer—you must

C. A. 1897

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

plead; and you overrule your plea if you answer. So that, assuming, which I do not assume really but only for the purpose of argument, that there is a perfectly good defence on the quo warranto, that is no answer at all, and has no reference to the question of discovery. In this particular case I think the order is perfectly right.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Russell, Hill & Co., for Hill Motum, Town Clerk of Newcastle-upon-Tyne; T. W. Gorst, Solicitor to the office of Woods, Forests, and Land Revenues.*

W. W. K.

C. A. 1897 *Aug.* 4.

[IN THE COURT OF APPEAL.]

COURT *v.* BERLIN AND OTHERS.

Solicitor—Partnership, Retainer by—Costs of Action—Dormant Partners—Costs incurred after Dissolution of Partnership—Partnership Act, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 17, *sub-s.* 2; *s.* 36, *sub-s.* 3.

The active partner in a firm consisting of himself and two dormant partners retained a solicitor to conduct an action for the recovery of a debt due to the firm. While the action was pending, the partnership was dissolved, and the dormant partners retired from the business. No notice of the dissolution was given to the solicitor, who did not know of the existence of the dormant partners, nor did the dormant partners do anything by way of withdrawing the retainer:—

Held, that the dormant partners were liable to the solicitor in respect of costs in the action incurred subsequently to the dissolution of partnership.

APPEAL from the judgment of a Divisional Court (Wills and Grantham JJ.) affirming the decision of a master.

The action was brought by a solicitor for the amount of a bill of costs against three defendants, named respectively Berlin, Brook, and Benjamin. It appeared that the three defendants had carried on business in partnership as furriers under the name of I. Berlin, the defendant Berlin managing the business, and the defendants Brook and Benjamin being dormant partners. The plaintiff, who did not know that Brook and Benjamin were partners in the business, was retained by Berlin

to bring an action against one Hyman in the firm name for a debt due to the partnership. On May 27, 1896, while the action was pending, the defendants dissolved partnership, and the dormant partners retired from the business. No notice of the dissolution of partnership was given to the plaintiff, nor did the dormant partners do anything by way of withdrawing the plaintiff's retainer. The plaintiff, who did not know of the dissolution, continued the proceedings in the action against Hyman, and judgment was ultimately recovered in that action for the amount of the debt due to the partnership. The plaintiff subsequently brought his action against the defendants for the amount of his bill of costs in the action against Hyman; but the defendants Brook and Benjamin contended that they were not liable in respect of any costs incurred in the action subsequently to the dissolution of partnership. On an application for judgment under Order XIV. an order was made that the plaintiff's bill should be referred for taxation to a master, who should have power to decide any question arising under the Partnership Act, 1890. The master held on the reference that the defendants Brook and Benjamin were not liable in respect of any costs incurred in the action against Hyman subsequently to the dissolution of partnership. The Divisional Court on a motion to vary the certificate of the master affirmed his decision.

Arthur Powell, for the plaintiff. The managing partner clearly had authority to employ the plaintiff in the first instance on behalf of the dormant partners, and therefore it must be taken that all three defendants originally instructed the plaintiff to conduct the action. It was held in *Underwood, Son & Piper* v. *Lewis* (1) that the retainer of a solicitor to conduct a common law action involves a contract by him to conduct it until it is finished. Therefore the plaintiff was bound and entitled to continue the action on behalf of the three partners unless his retainer was withdrawn. He had no notice of the dissolution, and there was nothing in the nature of a withdrawal of the retainer. The action was to recover a partnership

(1) [1894] 2 Q. B. 306.

C. A. 1897

COURT v. BERLIN.

debt in respect of which the dormant partners were interested. This was a partnership obligation incurred before the retirement of the dormant partners, and for which they therefore continued liable within s. 17, sub-s. 2, of the Partnership Act, 1890.

E. Clayton, for the defendants Brook and Benjamin. The retainer to conduct the action on behalf of the dormant partners was put an end to by their retirement. The plaintiff never gave credit to them, as he did not know of their existence, and therefore there is no hardship involved in holding that the authority of Berlin to employ the plaintiff on their behalf ceased on the dissolution of partnership. The only question in *Underwood, Son & Piper* v. *Lewis* (1) was whether the solicitors could throw up their retainer in the middle of an action, and it was held that their contract was an entire contract to conduct the action till its termination; but it is quite consistent with that view that the solicitor must be taken to act in the conduct of the action upon instructions continued from day to day, as was held by the Divisional Court in this case. Berlin was the only person known to the plaintiff in the matter and from whom he took instructions, and Berlin was not entitled as against the dormant partners to give instructions after the dissolution of partnership. The costs in question were debts contracted after the retirement of the dormant partners, and therefore under s. 36, sub-s. 3, of the Partnership Act, 1890, they, not having been known by the plaintiff to be partners, are not liable for those costs.

A. Powell, in reply.

LORD ESHER M.R. In this case the plaintiff, a solicitor, was retained to recover a debt due to a partnership firm consisting of three persons. Two of the partners were dormant partners, that is to say their names were not published to the world as being partners, but in other respects they were in the position of partners, and they must be taken therefore to have given authority to the active partner to bind them by contracts made by him in the ordinary course of the firm's business.

(1) [1894] 2 Q. B. 306.

C. A. 1897 COURT v. BERLIN. Lord Esher M.R.

The recovery of debts due to the partnership would be in the ordinary course of such business, and, therefore, the dormant partners must be taken to have given authority to the active partner to employ a solicitor to conduct an action for the recovery of such debts on the ordinary terms. No one employs a solicitor to bring such an action on the footing that he is to come to the person retaining him at every step in the action for fresh instructions. It is the recognised course of business that the retainer of a solicitor in such a case is to conduct the action until its termination, and that the contract of the solicitor who accepts the retainer is one entire contract by which he undertakes, unless his retainer is withdrawn, to conduct the action until it is finished. The retainer given to the plaintiff by the active partner for and on behalf of himself and the dormant partners was to conduct the action on the ordinary terms. Whilst the plaintiff was engaged in so conducting the action the dormant partners retired from the partnership. I do not think that it can reasonably be contended that, by doing something of which he had no notice, they withdrew the authority which was given to him to continue conducting the action on their behalf. Such a contention seems to me to be contrary to the very essence and meaning of the transaction according to the ordinary course of business. Possibly it might have been open to the dormant partners to give the solicitor notice that they were no longer partners, and that, so far as they were concerned, his retainer must be considered to be withdrawn, and that, if he proceeded with the action, he must look to the remaining partner for costs subsequently incurred. But, in the absence of such a notice, it must be taken that they were still employing him on the original terms. It must be remembered also that the debt that was being sued for was a partnership debt, and, subject to any agreement with regard to the partnership assets, they would have a right to treat it as recovered on their behalf as well as on that of the remaining partner, and to call upon him to account to them for their share of the proceeds of the action. For these reasons I think the appeal must be allowed.

C. A. 1897

COURT v. BERLIN.

A. L. SMITH L.J. This is an action by a solicitor against three defendants who carried on business in partnership, two of them being dormant partners, for his bill of costs in an action brought to recover a debt due to the partnership. The plaintiff was retained by the active partner, Berlin, to conduct a common law action on behalf of the firm. That retainer, as will be seen from the decision in *Underwood, Son & Piper* v. *Lewis* (1), gave rise to an entire contract by which the solicitor undertook to carry on the action until its termination. In the result the action was successful, and judgment was obtained against the defendant for the debt due to the partnership. The plaintiff thereupon brought this action for his bill of costs, and then for the first time he was informed that the partnership between the active partner and the dormant partners had been dissolved during the pendency of the action, and the dormant partners resisted the plaintiff's claim on the ground that they were not liable in respect of any of the costs incurred in the action after the date of the dissolution of partnership. The Divisional Court appears to have held that they were not liable on the ground that the liability for the costs of the different steps in the action must be taken to arise upon fresh instructions given de die in diem. If that was the ground of their decision, it appears to me to be contrary to the decision of this Court in the case of *Underwood, Son & Piper* v. *Lewis* (1), in which it was held that the retainer of a solicitor in a common law action gives rise to one entire contract for the conduct of the action to its termination, and the solicitor cannot in the midst of the action throw up his retainer and sue for his costs already incurred except in certain cases referred to in the judgment in that case. The question here is whether in a case where a partnership firm employs a solicitor to conduct a common law action for them in the ordinary way, namely, on the footing that his contract is an entire contract to conduct it to the end, it is open to the partners to dissolve partnership inter se, and then to say that the action was after that date no longer being conducted by the solicitor on their behalf. It is no doubt open to a client whilst the

(1) [1894] 2 Q. B. 306.

action is pending to withdraw the solicitor's retainer. I think, though it is not necessary to decide the point, that the dormant partners might upon the dissolution have given notice to the plaintiff that he was no longer to conduct the action on their behalf, and that, if they had done so, they would not have been liable. But in this case no such notice was given. Under these circumstances I think that they were liable for the costs incurred subsequently to the dissolution of partnership in the prosecution of the action.

RIGBY L.J. I agree. In this case reliance was placed on behalf of the defendants Brook and Benjamin on s. 36, sub-s. 3, of the Partnership Act, 1890, on the assumption that the debt sued for was, within the meaning of that sub-section, a partnership debt contracted after the retirement of the dormant partners. But was it such a debt? It was a debt which arose in respect of services which all three defendants, while they were still in partnership, must be taken to have instructed the plaintiff to render. When the dormant partners retired from the business no notice was given to the plaintiff withdrawing the instructions originally given to him. It appears to me that under these circumstances this is not a debt which comes within the meaning of the sub-section.

Appeal allowed.

Solicitor for plaintiff: *W. H. Court.*
Solicitors for defendants: *Rising & Ravenscroft.*

E. L.

C. A.

1897

July 22.

[IN THE COURT OF APPEAL.]

THE LEEDS PERMANENT BENEFIT BUILDING SOCIETY, APPELLANTS; MALLANDAINE (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Benefit Building Society—Money Lent to Borrowing Member—Interest of Money so Lent—Income Tax Act, 1853 (16 & 17 *Vict.* c. 34), s. 2, *Sched. D.*

A benefit building society lent money to borrowing members at a fixed rate of interest, and took from them a security on their property. The repayment of the loans was by weekly payments of a fixed sum, in respect of principal and interest, the proportion of interest to principal in each payment decreasing as time went on, and the principal remaining due decreased. No deduction was allowed to be made by the borrower in respect of income tax. The society were assessed to income tax under Sched. D. on the interest they received, as being interest of money within s. 2 of the Income Tax Act, 1853. On a case stated:—

Held, that the expression "interest of money" in s. 2 of the Income Tax Act, 1853, is not restricted to annual interest, and that the interest received by the society was not in respect of a loan on land, but of a contract relating to interest of money lent, and was therefore assessable in their hands to the income tax.

APPEAL from the judgment of a Divisional Court on a case stated by Commissioners of Income Tax.

The appellants are a building society duly established and maintained under the Building Societies Acts.

The objects of the society as set forth in the rules are, "to raise by the subscriptions of the members a stock or fund out of which to make advances to members upon security of freehold, copyhold, or leasehold estates by way of mortgage." Advances are made to members and to members alone.

The society transacts no business other than the receipt of money from some persons, and the lending out of it to others, and it does nothing else except such acts and things as are necessary and incidental to such business.

The constitution and course of business of the society are as follows: The members of the society are those persons who hold one or more shares, or one or more fifth parts of a share,

in the society, the shares being divided into two classes: (1.) Investors' shares, which are again divided into subscription shares and paid-up shares; (2.) Borrowers' shares. The members are divided into classes according to the shares they hold, namely, investors and borrowers. In addition to the members of the society there is another class of persons with whom the society has dealings, namely, depositors.

Investors are the members who invest capital in the society, which is used in making loans to borrowers. Such investments can either be made by paying in to the society a lump sum, in which case the investor is called a "paid-up investor," or by paying in weekly instalments, in which case the investor is called a "subscription investor." Paid-up investors pay in to the society either one or more sums of 100*l.*, in which case they are said to take one or more paid-up investor's shares in the society, or one or more sums of 20*l.*, in which case they are said to take one or more fifth parts of a paid-up investor's share in the society. In either case the money remains in the hands of the society, and accumulates at compound interest at the rates shewn in the rules until withdrawn, or until the share matures to its full value as fixed by the rules.

Subscribing investors pay in to the society either one or more sums of 2*s.* 6*d.* per week, in which case they are said to take one or more investor's subscription shares, or one or more sums of 6*d.* per week, in which case they are said to take one or more fifth parts of an investor's subscription share. In either case the money remains in the hands of the society, and to it is added by way of accumulation compound interest at a rate shewn in the rules until withdrawal, or until the share matures to its full value as fixed by the rules. In the case of investors of each class the interest is compounded monthly. In neither case can the investors withdraw the interest on their shares alone, but they have the privilege, subject to certain limitations, of withdrawing at any time the amount due to them in respect of each share or fifth part of a share, as indicated by the table under which the investment was made. When the shares, whether paid up or subscription, have matured to their full value, the investor must withdraw his money, although

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

he may and often does reinvest it in the society. The money withdrawn in either case consists partly of capital and partly of interest.

The borrowers are members to whom money is advanced by the society upon the security of their properties. A person who desires to become a borrowing member of the society sends in an application, giving particulars of the amount required and of the property proposed as security. If the loan is approved, the money is advanced as soon as a mortgage to the society is executed. The applicant for the loan must then determine upon which of the terms offered by the society he will take his loan. In all cases the advance is made in respect of one or more shares or fifth parts of shares which the borrower takes in the society. Not more than the sum named in the table under which the advance is made can be advanced in respect of one share. Upon each share, whether large or small, he pays 2*s*. 6*d*. per week. If the share be a large one, the repayment is spread over a great number of years, and, consequently, the whole amount of interest due in respect of the advance is large. Hence, of the first instalment of 2*s*. 6*d*. per week a relatively large part would be appropriated to interest, and a relatively small part to the repayment of the principal. If, on the other hand, the borrower elect to split up his loan into several smaller shares, then he would pay 2*s*. 6*d*. per week on each of those shares, and since they would be repayable in a relatively short time, the amount of the 2*s*. 6*d*. appropriated to interest would be smaller, and the amount appropriated to the repayment of principal would be larger. If the borrower take one or more fifth parts of a share instead of a whole share, the weekly payment is only 6*d*. per week for each fifth part; but in all other respects the same rules apply to a fifth of a share as apply to a full share. As the months proceeded in each case, of course the proportion of the monthly sum paid appropriated to the payment of interest would decrease, and that appropriated to the repayment of the principal would increase, for the simple reason that with each month's payment the interest-bearing capital decreases, although the monthly payment remains the same.

A member who has borrowed money on any one set of terms may elect to repay his debt upon any other of the sets of terms offered by the society. For instance, if he has borrowed 100*l.* to be repaid by 291 monthly instalments of 10*s.* each, he may, after repaying 20*l.* in seventy-nine months, split up his remaining debt into two shares of 40*l.* each, paying 1*l.* a month for ninety-one months. The proportion, therefore, of interest to principal constantly varies considerably, even in the case of loans which at their creation were identical in terms.

The depositors are persons who lend money to the society on deposit, and are entitled to receive in consideration thereof interest at rates from time to time varied at the discretion of the directors. Depositors differ from investors in several particulars. They are not members, but creditors of the society. Any sum of money is received by the society on deposit, and it can be withdrawn by the depositor at any time after certain notice, either with or without the interest accrued due, and, if without, the depositor leaves his interest in the hands of the society to be capitalised. All money received on deposit is employed in making advances to the borrowing members of the society.

In order to obtain necessary funds for its staff, officers, &c., the society charges a slightly higher rate of interest to borrowers than it grants to investors or depositors. The difference is as little as by calculation it is estimated will afford the necessary amount for carrying on the business of the society; but from time to time a surplus accumulates out of the fund so brought into existence beyond what is necessary for carrying on the business of the society, and this surplus is from time to time divided among the members of the society.

The society having been assessed by the Commissioners for General Purposes under Sched. D of the Income Tax Acts in respect of interest received from its borrowing members, appealed to the Commissioners for Special Purposes, contending that the society did not make any profits or gains within the meaning of the Income Tax Acts, and that it was therefore not liable to be assessed under Sched. D; and further, that the whole of the sums received by the society from the borrowing

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

members had already paid tax, because money is only advanced by the society for the purpose of being laid out by the borrowers in the purchase of property, and the repayment by instalments of the principal sum lent, together with interest thereon, is secured by a mortgage on the property so purchased. In other words, that these instalments are payments charged upon land, and since the full annual value of that land is chargeable with tax under Sched. A, without deduction in respect of the society's charge thereon, that the society's charge had in fact paid tax as part of the annual value of the land and could not be taxed again. The society, moreover, contended that to distinguish interest from capital in sums paid by borrowers would involve an actuarial calculation in each individual case. It was admitted, however, that the instalments paid by borrowers included interest, and that such interest was not annual interest within the meaning of the Income Tax Acts, and that the society refused to allow deduction of income tax by these borrowers in respect of such interest, on the grounds that the interest could not be distinguished, and because such interest was not yearly interest.

The Commissioners for Special Purposes found as facts that part of the instalments paid by the borrowers to the society, consisted of interest paid to and received by the society which was the subject-matter of the assessment under appeal, and that it was possible for the society, even though it might involve some abstruse calculations, to distinguish a payment by a borrower of interest from a repayment of capital by instalments in all sums received by the society from these borrowers.

They therefore confirmed the assessment subject to this case.

The Divisional Court (Wills and Grantham JJ.) gave judgment for the Crown.

The society appealed.

Dicey, Q.C., and *Lord Robert Cecil*, for the society. The Crown does not claim on profits, but claims to tax interest received by the society from borrowers. This amounts to double taxation, since the society's funds consist of money lent out on land, which is taxed under Sched. A, and of which they

are mortgagees. The tax under Sched. A is payable in the first place by the occupiers of the land, and the question whether they deduct the amount under 5 & 6 Vict. c. 35, s. 60, No. 4, rr. 10 and 11, from their payments to the society does not affect the obligation on the part of the Crown to look for payment to the mortgagors, who would have to make the return under s. 52 of the Act, and not to the mortgagee.

Secondly, this is not annual interest, and could only be charged under 5 & 6 Vict. c. 35, as profits. The words of Sched. D in 16 & 17 Vict. c. 34, are, "for and in respect of all interest of moneys, annuities, or other annual profits and gains not chargeable by virtue of any other schedule contained in this Act." It was held in *Clerical, Medical and General Life Assurance Society* v. *Carter* (1) that "interest of money" not being profits was subject to income tax under Sched. D of that Act; but Fry L.J. expressly reserved the question whether such interest must not be annual interest. (2) The machinery for collection under the Income Tax Acts is not applicable to interest other than annual interest. The amount of such interest can be easily calculated, but this is not the case where the interest is not annual. In this present case the amount payable for interest is constantly varying, and the difficulty of separating the repayments into interest and principal would be very great. Such difficulties suggest a reason why annual interest only is charged as interest, and why all other interest should be chargeable only as profits. In either case, whether this is annual interest or not, the society cannot be taxed in respect of it.

[They cited *Gresham Life Assurance Society* v. *Styles* (3); *Goslings* v. *Blake*. (4)]

The Solicitor-General (*Sir R. Finlay, Q.C.*), (*Danckwerts* with him), for the Crown. The charging words of s. 1 of 16 & 17 Vict. c. 34, are: "for and in respect of all interest of money, annuities, dividends, and shares of annuities," and the section contains no words limiting the interest to annual interest. This section has been repealed by the Statute Law

(1) (1889) 22 Q. B. D. 444.
(2) 22 Q. B. D. 444, at p. 450.
(3) [1892] A. C. 309.
(4) (1889) 23 Q. B. D. 324.

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

Revision Act, 1875, but it may be referred to in support of an argument on the construction of s. 2 of the Act. The words in Sched. D in that section are, "for and in respect of all interest of money, annuities, and other annual profits and gains," and there is nothing to shew that the interest in this case is limited to annual interest. The word "interest" is perfectly general and includes the present case, which is one of interest on a loan of money. The question whether or not there is security does not affect the construction of the statute.

Dicey, Q.C., in reply.

LORD ESHER M.R. In my view we have nothing to do with Sched. A, for this is not a case of money lent in respect of land, but of money lent to those who wish to borrow it. There are members of the society who do not want any money lent to them, but there are others called borrowers who borrow money on a contract, under the articles of association, that as long as any of it remains due they will pay interest on the amount due at a rate which we are told is 3½ per cent. If they pay off a part of the amount due the rate is not altered, but only the amount on which it is payable. Then, by way of collateral security and as a different contract, the borrowers mortgage their premises; but that has nothing to do with the other contract, which is not a contract of mortgage or with regard to land, but simply a contract for a loan at interest.

There has been an argument on the decision in the *Clerical, Medical and General Life Assurance Society* v. *Carter* (1), which put an interpretation on the words of Sched. D with which we have to deal. It is admitted that the appellants are bound by that decision, but only if the interest that they receive can be said to be annual interest, and a distinction is taken between the facts of the two cases. That distinction is, to my mind, wholly immaterial, and does not affect the grounds of the decision. It seems to me to make not the smallest difference whether the interest is annual interest or not. Construing the rule according to its ordinary grammatical meaning, the interest mentioned in it includes all interest, and therefore, when money

(1) 22 Q. B. D. 444.

is lent and there is any interest whatever payable, that interest is chargeable to income tax. The society receive interest: who pays it and how much each person pays we do not know, but the society receive it, and are not bound to allow, and in fact do not allow, any deduction. They receive it as interest and are taxable under the section.

I think the plain construction of the statute is that if a person lends money and, in respect of that money so lent, obtains interest, that interest is taxable. The difficulty of calculating what is the amount of the interest received, even if it would be difficult for a competent man to calculate it, does not affect the matter, nor does the argument that because the society have taken a collateral security the contract for the loan of money has been altered into a contract for the advance of money in respect of land. I am clearly of opinion that the Crown is entitled to judgment, and that the appeal must be dismissed.

A. L. SMITH L.J. I agree in the decision which the commissioners have arrived at, and which was confirmed by my brothers Wills and Grantham, the facts decided being that these instalments paid by the borrowers to the society by way of interest were the subject-matter of assessment under the Income Tax Act. Now, before I go to the Act of 1853, on which this case really depends, I will refer to a case in the Court of Appeal since that Act. In that case it was argued, and the argument has been repeated in this case, that in the case of a company carrying on business such as this, the only matters assessable to income tax were gains and profits derived in the way of business by that society, and that interest was not an assessable subject-matter, and that an item such as interest received by the society could not be taken separately, but was absorbed into gains and profits. That was the argument addressed to this Court in the case of the *Clerical, Medical and General Life Assurance Society* v. *Carter* (1), which was heard before Lord Esher, Fry L.J., and Bowen L.J. That argument was repudiated, and the decision in that case, which

(1) 22 Q. B. D. 444.

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

A. L. Smith L.J.

is binding on us and with which I agree, was that interest was a separate subject-matter on which income tax could be levied by the Crown. Then it said that the interest in this case is not interest similar to that covered by that decision. I do not follow that. Shortly, what are the facts which raise this point? The building society lends money to borrowers who are wishing to buy houses, and they take repayment of the principal lent together with interest by instalments, and by way of security they take a mortgage of the man's house to the society, the payment off of the principal plus interest being according to the agreed terms. The rate of interest always remains the same, namely, 3½ per cent.; the amount of interest payable as the years run out, not in percentage but in actual amount, gets less, because, as time goes on, the principal becomes less, and therefore the amount of interest payable on the principal becomes less but the rate remains the same.

Now, that being the position of matters, I turn to the Income Tax Act of 1853 to see whether or not this interest is an assessable subject-matter under the Act. It seems to me that if I confine my attention to the sections of this Act which have application it clearly is. I will take first of all the 1st section of this Act of 1853, which is the charging section. Can anything be clearer than the words of that section, "for or in respect of all interest of money, annuities, dividends, and shares of annuities payable to any person or persons, bodies politic or corporate, companies or societies, whether corporate or not corporate"? Does the society receive interest upon money lent by the society to the borrower? To this there can be but one answer—that they do receive such interest. Then, I ask, why is not that interest charged as a separate item in this charging section? Why is not that to bear the tax which is imposed upon it by this charging section? There is no answer to that, nor has any been attempted on behalf of the appellants in this case. What they do is, they fix upon Sched. D, and they fix upon a phrase, which I will deal with, in the 2nd section, which section ought to be looked to to see what is the meaning of Sched. D. That Schedule says: "For and in respect of the annual profits or gains arising or accruing to any person

residing in the United Kingdom, and for and in respect of all interest of money "—for and in respect of all annuities—for and in respect of all "other annual profits and gains not charged by virtue of any other schedule contained in this Act." Now, what does it matter, excepting for a question hereafter raised, whether this is annual interest or not, or whether this ought to be read, "for and in respect of all annual interest of money, annuities, or annual profits"? I do not read it like that; I read it, "for and in respect of all interest of money"; and I ask myself this question: Is this 60,000*l.* a year, or whatever it is, which this building society is receiving by way of interest, interest upon money which they loan to the borrowers? What I have said with regard to the 1st section seems to me to be apposite to the 2nd section. But it is said, "Well, if it is an annual interest, then you get into difficulties under Sched. A in the Act of 1842, and the tax ought to have been charged upon the borrower and not upon the lender." My answer to that is, whether the borrower might have deducted it or not, upon the facts of this case nothing has been deducted. It is proved that this interest—the 3½ per cent. without any deductions for income tax—has been paid to this society; they have refused to allow deduction, and are in receipt of the whole without any income tax having been deducted from it, as is found by the commissioners. Although the contention of the appellants is now that they ought not to be charged with income tax, in my opinion they have received money which is charged with the tax, and they are the persons who are bound to pay it. For these reasons I am of opinion that the judgment of the Queen's Bench Division ought to be upheld, and the appeal dismissed.

RIGBY L.J. I am of the same opinion. The statute that we have to construe is that of 1853. The 1st section of that statute appears to me to be material. That indeed has been repealed by the Statute Law Revision Act; but it is not suggested on the part of the appellants, nor do I think it could be reasonably suggested, that that repeal alters the substantial law on the subject. We are not only entitled, but bound to read s. 1 as if except for the purposes of the Statute Law

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

Rigby L.J.

Revision Act it had not been repealed. There, I find, as a separate taxable subject, in words which are perfectly unambiguous, "all interest of money." That which is the charging section affords a key, if any key were wanted, to the meaning of the same words when we get them in the schedules of charge, Sched. D, s. 2—"for and in respect of all interest of money"—the very words in the charging section. That being so, I do not think we are at liberty to go further and to see whether those words, following exactly the charging section, might, if they were found only in the schedule, by some possibility be cut down by other words there to be found. The effect of them is derived from s. 1, and they must have the same meaning in Sched. D as they have in s. 1. It appears to me that in substance this matter has been decided before in the *Clerical, Medical and General Life Assurance Society* v. *Carter* (1) in this court. It seems to me that that decision is conclusive of this case, and that the society receiving interest on money is at any rate primâ facie chargeable with income tax in respect of that interest, even though it be true, as found by the Special Commissioners, that this is not in the nature of annual interest. Of course in one sense it is annual interest. Whether it be annual interest within the meaning of these Acts may be a difficult question; but whether it is or is not, I should hold that it is a chargeable subject-matter, and that the society are chargeable in respect of it. Now, it is argued as an alternative that after all, notwithstanding the finding of the Special Commissioners, it may be annual income, and if it is annual income within the meaning of the Acts, then that there is an exemption from payment by this society, and it is argued that that exemption exists utterly without regard to the question whether in fact any tax whatever has been paid by any person whatsoever. I think that is driving the Acts to an absurdity that we are not bound here to give way to. If and so far as the tax has actually been paid by the society, I may assume that it would be contrary to the spirit and the meaning of the Acts—and this I imagine the Crown would be ready to admit—that it should be paid twice over; but on those

(1) 22 Q. B. D. 444.

who assert it has been paid lies the burden of proof. Whatever else is plain in the present case we must take it upon this state of facts that the society have not paid a single farthing, and they get the whole of the interest quite without any charge under the Income Tax Acts. We are asked to deal with certain sections of the Act of 1842 with a view of coming to a conclusion that, though the Crown might not have charged the income tax in respect of this property upon owners and occupiers, that though that may not be done, yet the Crown cannot get it at all—that they have lost their opportunity, and they cannot get it from the society. I cannot find anything like it in the Acts. Rule 10, which was so much relied upon in that schedule to s. 60, only says this: that landlords who have allowed the deduction, as they are bound to do when their tenants have paid, and persons who are not only owners but also occupiers, are to be entitled to deduct what they have paid from any annual payment of money. Now, assuming that that includes the case of a mortgagee, it must be shewn that there are landlords who have made the deduction, or that there are persons who are owners and also occupiers. The society claim to be treated as having paid this already, which they have not done. They have not made out that case as regards a single sixpence of money. I do not think it is necessary to go further in the construction of those sections. Here we have interest undoubtedly received, which is according to my judgment taxable as a subject-matter of taxation under the Act of 1853, and nothing which would go a single step in the direction of proving that the society are exempted under any section of the Act of 1842. The fact was relied on that many years had gone by, and the Act had been annually re-enacted. We are only dealing with the present year. For anything I know, during past years all the Crown considered themselves entitled to has been recovered from the owners of the mortgaged property, or all that they could practically recover, and it may have been found out that that mode of dealing with the case was unsatisfactory, and they may have changed the mode in which they seek to get that tax which is due under the Acts. I rather assume that it is so, because if that had not been the case, and if the

C. A. 1897

LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE.

society had been able to shew that the tax had already been paid to the Crown so as to lead up to the attempted defence under the Act of 1842, I am pretty sure we should have heard of it. There is therefore a plain case according to my judgment under the Act of 1853, and no conceivable excuse made out, and no facts upon which an excuse could be made out, under the Act of 1842.

Appeal dismissed.

Solicitors for appellants: *Torr & Co., for Middleton & Sons, Leeds.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

A. M.

C. A. 1897 *July* 26.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF DAVID EVANS *v.* THE RIGHT REVEREND THE LORD BISHOP OF DURHAM.

Ecclesiastical Law — Clergy — Deprivation—Sentence in Consistory Court—Subsequent Deposition by Bishop—Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *s.* 8.

Where a clergyman is deprived by sentence of the Consistory Court, and it appears to the bishop of the diocese that the clergyman ought also to be deposed from holy orders, the sentence of deposition, under the Clergy Discipline Act, 1892, s. 8, need not be delivered concurrently with that of deprivation, but may be passed at a subsequent time.

RULE NISI calling upon the Bishop of Durham to shew cause why a writ of prohibition should not issue to prohibit him from further proceedings for the deposition of one Evans, the applicant, from holy orders.

From the affidavits used upon the application it appeared that a complaint had been made against the applicant under the Clergy Discipline Act, 1892, charging him with various offences under that Act, which complaint had been heard in the Consistory Court of the Diocese of Durham by the chancellor of the diocese and assessors on May 29 and 30, 1896. The

applicant was found guilty of some of the offences charged against him, and the chancellor, acting under rule 31, sub-r. 1, of the rules made under the Act, notified to the bishop that the applicant had been so found guilty and that sentence of deprivation should be passed upon him. Accordingly, on August 6, 1896, the bishop pronounced the sentence of the Consistory Court, by which the applicant was deprived of his preferment. The applicant presented a petition under s. 4 of the Act to the Privy Council for leave to appeal against the judgment of the Consistory Court upon the facts, but leave was refused. Upon December 16, 1896, the bishop, acting under s. 8 of the Act, notified to the applicant his intention to depose him from holy orders. The present rule was, therefore, obtained by the applicant, who contested the jurisdiction of the bishop to pass a sentence of deposition after sentence of deprivation had been already pronounced. (1)

(1) Rule 31 of the Rules of September, 1892, made under the Clergy Discipline Act, 1892, relates to "The passing of Sentences," and is in the following terms:—

"(1.) Where a defendant is found guilty on a trial in the Consistory Court in pursuance of the Act, the chancellor shall notify to the bishop that the defendant has been found guilty, and what sentence should be passed on the defendant.

"(2.) The sentence shall be pronounced, if it is a sentence of deprivation, by the bishop, and, if it is any other sentence, by the chancellor, unless the bishop signifies to the chancellor his desire himself to pronounce sentence.

"(3.) If the bishop is present at the conclusion of the trial, the sentence may be pronounced forthwith by the bishop or chancellor, as the case may be; but if the bishop is not so present the chancellor shall adjourn the case in order that the notification aforesaid may be made to the bishop.

"(4.) Where the sentence is not forthwith pronounced at the conclusion of the trial, the bishop or the chancellor, who is to pronounce sentence, shall fix a time and place for the sentence to be pronounced, and shall cause the registrar to give three clear days' notice to the prosecutor and defendant of the time and place so fixed.

"(5.) The registrar shall attend the bishop or chancellor in pronouncing sentence, and shall record the sentence in the registry of the diocese."

By 55 & 56 Vict. c. 32 (The Clergy Discipline Act, 1892), s. 6, sub-s. 1 (*a*), "When a clergyman is under this Act adjudged guilty, regard shall be had in considering the sentence to the interests of the ecclesiastical parish or place concerned, and not to precedents of punishments."

By s. 8, "Where by virtue of this Act, or of any sentence passed in pursuance of this Act, the preferment of a clergyman becomes vacant, and it appears to the bishop of the diocese that such clergyman ought also to be

C. A. 1897

REG. v. DURHAM (LORD BISHOP).

1897. May 25. *C. A. Russell, Q.C.* (*Errington* with him), for the bishop, shewed cause against the rule. The bishop has jurisdiction to pass a sentence of deposition from holy orders, notwithstanding that a sentence of deprivation has already been passed. The sentence of deprivation was the sentence of the Consistory Court and not of the bishop personally, though it was necessary under r. 31, sub-r. 2, that it should be passed by the bishop. The sentence of deposition is the bishop's own sentence, and may be passed by him at any reasonable time after the sentence of deprivation; in fact, it is apparent from the language of s. 8 that the jurisdiction of the bishop to depose only arises when the clergyman's preferment becomes vacant by reason of the sentence of deprivation passed by the Consistory Court.

[He was stopped by the Court.]

Sir W. Phillimore (*Yelverton* and *W. T. Lawrance* with him), in support of the rule. The bishop had no power to postpone passing sentence of deposition and to keep it hanging over the applicant's head; if sentence of deposition was to be pronounced at all, it should have been pronounced immediately upon the pronouncing of sentence of deprivation; this is clearly implied by s. 8 of the Act, which says that the bishop may depose the clergyman "by sentence and without any further formality." Sentence of deprivation must always under the Canon law be passed by the bishop: *Procurator-General* v. *Stone* (1); and the rules under the Act of 1892 prescribe that it shall be passed by him; upon passing it he must without formality proceed to depose the clergyman, if the case in his opinion renders such a sentence necessary. There is no provision in the rules for a notification by the bishop to the clergyman, after passing sentence of deprivation, that he intends to pass a further

deposed from holy orders, the bishop may, by sentence and without any further formality, depose him, and the sentence of deposition shall be recorded in the registry of the diocese: provided always, that such clergyman may appeal against the said sentence within one month from the date thereof to the archbishop of the province, whose decision shall be final."

(1) (1808) 1 Hagg. Cons. 424.

sentence of deposition. The original sentence of deprivation, though it may be supplemented at the time by a sentence of deposition, cannot be subsequently altered or added to.

C. A. Russell, Q.C., in reply. The power to depose is an independent power of the bishop, and has nothing to do with the Consistory Court, but until the latter Court has pronounced sentence of deprivation the jurisdiction to depose does not arise. From the provisions in the Act as to appeals, it is plain that the jurisdiction of the bishop to depose can be, and as a rule ought to be, exercised subsequently to the passing of the sentence of deprivation. Under s. 4 the appeal from the finding of the Consistory Court on the facts is by presentation of a petition to the Privy Council for leave to appeal; under s. 8 appeal against a sentence of deposition is by appeal within one month to the archbishop; if, therefore, sentence of deposition had been pronounced at the same time as sentence of deprivation, it would almost necessarily have involved separate concurrent appeals to the archbishop and the Privy Council. The bishop exercised a sound discretion in waiting until the sentence of deprivation could not be reversed before proceeding to pass sentence of deposition. The expression "without any further formality" means that, when the bishop proceeds to depose a clergyman, the sentence shall of itself make the deposition effective, and that it shall not be necessary to divest the clergyman of his insigna and comply with the other formalities of degradation. (1)

DAY J. I am of opinion that this rule must be discharged. It is not necessary for me to enter upon a consideration of the new rules that have been cited in argument, for I base my decision entirely upon the language of the statute itself. The new rules for carrying the Act into effect were made under the authority given by s. 9; they were clearly not made, or intended, to control or modify the provisions of the Act, but only to enable the Act to be carried out; the Act must therefore be read by itself and not by the light of the rules, which deal with

(1) See Burn's Ecclesiastical Law, vol. ii. p. 139, tit. Degradation.

C. A. 1897

REG. v. DURHAM (LORD BISHOP).

Day J.

matters of detail and arrangement in the administration of the Act.

Sect. 6 provides generally for the sentence of the Court by which the clergyman has been adjudged guilty—that is to say, the Consistory Court; no mention is made in the section of any power of degradation or deprivation of spiritual functions; it deals only with deprivation or loss of preferment. Then s. 7 provides for proceedings in case of disobedience to sentence, and with that section the whole of the provisions as to sentences of the Court, as punishments for offences, come to an end.

But s. 8 contains another provision which, speaking for myself, I do not look upon in the same light. By that section a power is entrusted to the bishop alone, and not to the Court; the sentence of the Court, and disobedience to such sentence, have already been dealt with, and this section deals with a more serious matter—degradation and deposition from holy orders. The introductory words, "where by virtue of this Act, or of any sentence passed in pursuance of this Act," shew that the power of deposition given in the section is not a sentence of the Court, but something which, if the bishop so determines, may follow on that sentence. In providing that the bishop may depose him "by sentence" the section means that he may do so by declaring his will, and not that it is to be done by the sentence of a court in the ordinary sense. There is good sense in the explanation which has been given by counsel for the bishop of the words "without any further formality"; it was intended to put an end to, and render unnecessary the application of, the ancient forms of procedure after deposition had been pronounced.

Reliance has been placed upon rule 31, which provides that the chancellor is to notify to the bishop the sentence which he thinks ought to be passed; a very proper provision, seeing that the chancellor tries the case and knows all the evidence; but it has nothing to do with the deposition of the clergyman from holy orders, with which the chancellor is not competent to deal; the bishop alone can deal with it, and he only in cases where the clergyman has already been deprived of his preferment by sentence of the Consistory Court. If the bishop comes

to the conclusion that he ought to depose him, he may do so by his own sentence—that is, by a declaration that he deposes him from holy orders, and this may be done at any reasonable time—at any time at which it is right and reasonable to consider the question of deposition. It is not here suggested that the time was unreasonable: from August to December was not too long for the consideration of so serious a matter, and the bishop had in December made up his mind and given notice to the clergyman. The clergyman, whose petition to the Judicial Committee of the Privy Council for leave to appeal on the facts had been refused, then obtained this rule, which I think ought to be discharged.

One other argument I may notice shortly. It was contended for the bishop that, there being a power in the Judicial Committee to give leave to appeal on the facts, the bishop ought not to depose the applicant before he had been finally deprived of his preferment either by refusal of leave to appeal or by dismissal of his appeal. With this I agree. A clergyman might otherwise be in the position that he succeeded in his appeal on the facts, but nevertheless found himself deposed from holy orders by sentence of the bishop passed before the hearing of his successful appeal. What is he to do under such circumstances? It is far more reasonable that the bishop should allow ample time for any appeal on the facts before proceeding to depose him. Then there is the further point that under s. 8 the appeal to the archbishop against the sentence of deposition must be brought within one month; and it would be extremely inconvenient if an appeal to the archbishop were to be running concurrently with an appeal to the Judicial Committee, which would almost necessarily be the case if the bishop were to depose without allowing time for proceedings in the Judicial Committee. In saying that this rule should be discharged I must add that I am unable to see a shadow of doubt in the case.

LAWRANCE J. I am entirely of the same opinion. The principal argument on the applicant's behalf was that the sentence of deprivation pronounced by the bishop in accordance

C. A. 1897

REG. v. DURHAM (LORD BISHOP).

Lawrance J.

with the finding of the Consistory Court and the sentence of deposition from holy orders ought to have been pronounced at the same time; but after considering the statute and the rules (which have the force of an Act of Parliament) I can find nothing to support such a contention. I agree with what has been said as to the position of the bishop in the matter: in pronouncing the first sentence, he is the mere mouthpiece of the Court; under rule 31 the chancellor certifies to him what the sentence ought to be, and the bishop passes it. Then by s. 8 the bishop has jurisdiction for the first time to pass a sentence of deposition, and it is his right and duty to see whether that further sentence should be passed; if he thinks such a sentence necessary, it is for him to pass it. But to say that the bishop has anything to do with the original sentence of deprivation, beyond pronouncing it, is wrong; that is the sentence of the Consistory Court, pronounced by the bishop, while the sentence of deposition is that of the bishop himself, pronounced after the necessary consideration. I can imagine a case in which a much longer time than that here involved might be necessary before the bishop would feel justified in deposing a clergyman; it might be that in two or three years after the sentence of deprivation something much more serious than the charges actually proved might come to the bishop's knowledge, which would in his judgment require that he should exercise his power of deposition. I am aware that this is an extreme case, but it is not so absurd as that the bishop should pronounce the sentences of deprivation and deposition in the same breath; he must have time, if necessary, after the sentence of deprivation to satisfy himself whether he should exercise his discretionary power of deposition. In taking from August to December, I think that the bishop was well within his rights; it is a matter requiring the exercise of considerable care and thought, and should not, except in the very clearest case, be decided in an offhand way at the time that the sentence of deprivation is passed.

Rule discharged.

W. J. B.

The applicant appealed.

1897. July 26. *Sir W. Phillimore* (*Yelverton*, and *W. T. Lawrance* with him), for the applicant.

C. A. Russell, Q.C., and *Errington*, contra, were not heard.

Lord Esher M.R. This is a hopeless appeal, for we are asked to disregard the plain words of the statute to make the result consistent with natural justice. The case is that grave charges have been made against a clergyman, and the bishop has had to inquire into these charges. The charges were investigated in the Consistory Court by the chancellor, and on some of them the clergyman has been found guilty. The chancellor reported his conclusions on the facts, and the Act seems to say that he is to report also what sentence should be passed. It does not seem to me clear whether it is the chancellor's sentence; but however that may be, the sentence of deprivation was pronounced in the Consistory Court by the bishop, and it is not argued that there was anything incorrect in the trial or sentence. It is said, however, that the sentence so pronounced ought to be final, not only as to that which has been tried in the Court, but also as to something which was not, and in my opinion could not, be tried there. The 8th section of the Act says in plain terms that it is for the bishop to determine whether a clergyman who has been deprived ought to be deposed, and if he comes to that conclusion sentence has to be passed. It is said that the bishop must have been in the Consistory Court to pass sentence of deprivation, and ought then to have passed, if he thought it ought to be passed, a sentence of deposition, and that if he does not then do so he has no jurisdiction to do it later on. I can find nothing in the Act to support this contention or anything which would oblige him to keep the matter open by adjournment. The deposition is a disciplinary power given to the bishop, and is distinct from the trial in the Consistory Court. It is said that it is contrary to natural justice that there should be a dividing up of the sentence on the clergyman, and that the sentence of deposition should stand over. I cannot see that there is anything contrary to natural justice in this; but if there were the statute has given the power to the bishop subject only to appeal to the archbishop.

C. A. 1897

REG. v. DURHAM (LORD BISHOP).

There seems to me to be nothing on which to found the arguments for the appellant that have been addressed to us, and the appeal must be dismissed.

A. L. SMITH L.J. This case turns upon s. 8 of the Clergy Discipline Act, 1892. It appears from the rules made under the authority of the Act that in the case of the deprivation of a clergyman the sentence is that of the chancellor of the diocese delivered by the bishop. It seems to me that the bishop does not come into the matter till he has ministerially to pass sentence. It is said that when sentence of deprivation has been passed the bishop has no further jurisdiction, and that even if he had it was not exercised in a reasonable time. The opening words of the section are, "Where by virtue of this Act or of any sentence of deprivation passed in pursuance of this Act the preferment of a clergyman becomes vacant," and this refers to a sentence which has been passed by virtue of which a clergyman has been deprived. It is obvious, therefore, that the argument that the sentence of deprivation finishes up the matter is untenable. The bishop has a further jurisdiction under which he may depose a clergyman without any further formality. We are told that we ought to read into the Act that the sentence of deposition must be given at the same time as the sentence of deprivation. We have no jurisdiction to do that, but must take the plain words of the Act in which there is no limitation of time. Then it is said that it is contrary to natural justice that the penalty on the clergyman should be pronounced partly at one time and partly later on. I cannot see the injustice, and it seems to me that the Legislature in giving this power to the bishop, with an appeal to the archbishop, might have done so in the conviction that neither would act in a way contrary to natural justice. It occurs to me, though I do not give any decision on the point, that it may be that the bishop, having power to pass sentence of deposition without further proceedings, is not a person to whom a writ of prohibition would go. However that may be, the appellant has failed to shew that the action of the bishop was unjust or illegal, and the judgment of the Divisional Court must stand.

C. A. 1897

REG. v. DURHAM (LORD BISHOP).

RIGBY L.J. I quite agree, and should be content to base my judgment on the reasons already given. I think, however, another ground for our judgment is supplied by the words of the statute in s. 1. That section deals with the effect of conviction of a clergyman for treason felony or grave misdemeanours and certain other offences, and enacts that within twenty-one days his preferment may be declared vacant by the bishop. If the bishop does not do this within twenty-one days—he may be abroad or unwell—it may be done by the archbishop without the bishop ever hearing of the matter. If the argument is well founded that the penalty on the clergyman cannot be divided but must all be pronounced at the same time, then, in the case I have put, there could be no deposition however unfit the clergyman might be to hold office. This is an additional reason why we should not put on the Act the strained construction which has been suggested.

Appeal dismissed.

Solicitor for applicant: *T. H. Philpots.*

Solicitors for bishop: *Cunliffes & Davenport, for J. G. Wilson, Ornsby & Cadle, Durham.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1897 *July* 28.

J. & P. COATS, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Conveyance on Sale—Exchange of Shares—Ad Valorem Stamp—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 55, 73.

By an instrument, entered into in pursuance of an agreement, a shareholder in one company transferred his shares to another company in exchange for certain shares in the latter company:—

Held, that the transaction was a conveyance on sale of the shares within ss. 54 and 55 of the Stamp Act, 1891, and that the instrument was therefore chargeable with an ad valorem stamp.

Judgment of the Queen's Bench Division, [1897] 1 Q. B. 778, affirmed.

APPEAL from a judgment of a Divisional Court, reported [1897] 1 Q. B. 778, on a case stated by the Commissioners of

C. A. 1897

COATS v. INLAND REVENUE COMMISSIONERS.

Inland Revenue. The facts are fully set out in the Court below.

It appeared that the appellants, J. & P. Coats, Limited, were desirous that all the holders of ordinary and preference shares of a firm called James Chadwick & Brother, Limited, should sell their shares to J. & P. Coats, Limited, in exchange for fully paid-up preference and ordinary shares of that company. At a meeting of the shareholders of James Chadwick & Brother, Limited, a resolution was passed that it was desirable that the amalgamation should be carried out. A memorandum was prepared for signature by the shareholders in James Chadwick & Brother, Limited, by which a shareholder signing the memorandum agreed to transfer to J. & P. Coats, Limited, all his shares in James Chadwick & Brother, Limited, in exchange for fully paid shares of J. & P. Coats, Limited, in certain proportions therein set out. Such a memorandum was signed by Alfred Kaye, one of the shareholders in James Chadwick & Brother, Limited, and he afterwards executed an instrument, which was also executed by J. & P. Coats, Limited, whereby he, "in exchange for" certain shares of J. & P. Coats, Limited, transferred to that company certain shares in James Chadwick & Brother, Limited, which J. & P. Coats, Limited, thereby agreed to accept.

The question arose as to the stamp duty with which this instrument was chargeable.

The commissioners were of opinion that it was a transfer made upon a sale and must be charged under the head "Conveyance or Transfer on Sale" in the first schedule to the Stamp Duty Act of 1891, with an ad valorem stamp, and they ascertained the value of the shares of J. & P. Coats, Limited, taken over by Kaye, and assessed the ad valorem duty accordingly.

On a case stated the Divisional Court (Wills and Grantham JJ.) gave judgment for the Crown. (1)

The appellants, J. & P. Coats, Limited, appealed.

Cozens-Hardy, Q.C., and *Theobald*, in support of the appeal. If the substance of this transaction is looked at it is an exchange

(1) [1897] 1 Q. B. 778.

of one sort of personal property for another, and the document carrying this into effect is not a transfer on sale. In *Great Western Ry.* v. *Inland Revenue Commissioners* (1) the Great Western Railway took over two other undertakings which then ceased to exist, and the Court decided that this was not an exchange. In *Foster* v. *Inland Revenue Commissioners* (2) the members of a firm turned the concern into a company. Neither of these cases governs the present, and it does not seem to have been argued in either case that there was an exchange. The exchanges dealt with in the first schedule to the Stamp Act, 1891, under the title "Exchange or Excambion" are not confined to real property. In this case the transaction was not a sale, but comes within the words of the schedule. It is an exchange in another case than those specified in s. 73, being an exchange of property for other property of a like nature. The instrument does not come within the definition of "conveyance on sale" in s. 54 of the Act of 1891 of an instrument whereby any property, or any estate, or interest in any property "upon the sale thereof" is tranferred or vested in a purchaser. For a sale there must be a purchaser and a vendor, but here it cannot be said that either party is purchaser or vendor.

The Attorney-General (*Sir R. E. Webster, Q.C.*), and *Danckwerts*, for the Crown, were not called on.

LORD ESHER M.R. I am quite clear that the decision in this case must be upheld. The first thing is to see what is the construction of the Act and what is the rule with regard to anything like this transaction. It must be admitted, and is admitted, that here there is a conveyance by a man of property which consists of shares in a company. We have got to apply to that state of things that which is stated by Lindley L.J. in the case of *Foster* v. *Inland Revenue Commissioners*. (3) We know who is the person conveying. What is the consideration? The Lord Justice in the case to which I have referred says: "The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities,"—that is the

(1) [1894] 1 Q. B. 507. (2) [1894] 1 Q. B. 516.
(3) [1894] 1 Q. B. 516, at p. 528.

C. A. 1897

COATS v. INLAND REVENUE COMMISSIONERS.

Lord Esher M.R.

consideration, and that is the case here—"which for the purpose are to be regarded as equivalent to money," not in general language, but "by reason of s. 71 of the Act." It is admitted that may be read to be by s. 55 of the present Act. His construction of the Act is, that if property is conveyed for a consideration, and that consideration is shares, it is equivalent to a conveyance of the property for money. Now take Kay L.J.'s words in that case (1): "It seems to me clearly to be, under the words of this statute, 'a conveyance on sale' for a consideration, which, if not money, at least is money's worth." A. L. Smith L.J. says that on a "conveyance on sale" s. 71 implies that it may be in consideration of any stock or marketable security. Here, the transaction can be described exactly and precisely in the language used in that case. But somebody has tried to make an instrument which shall not be in the language of that case. They have put here the consideration first before the conveyance, in order that they may get in those words "in exchange." But supposing you read it the other way, "I, Alfred Kaye, do hereby transfer"—or if you like so far as this instrument is concerned "deliver"—"to J. & P. Coats, Limited, twenty-five ordinary shares, and so on, in the undertaking called James Chadwick & Brother, Limited," that is the property which he had to deliver or to transfer, and suppose "in consideration of" is put in instead of "in exchange for eight fully paid-up shares allotted to me." You have then a transfer or delivery of shares which are his property in consideration of his receiving shares in another company. That is the exact transaction which is dealt with in the judgments and is described in that case. It is also described to the same purpose really in the case of the *Great Western Ry.* v. *Inland Revenue Commissioners* (2), which preceded it. In my opinion, therefore, in this case the decision of the Divisional Court was perfectly right, and this appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. The question is whether this document was a conveyance on sale within the meaning of the Stamp Act, 1891. That Act, by s. 54, gives a

(1) [1894] 1 Q. B. 516, at p. 531. (2) [1894] 1 Q. B. 507.

definition of what shall be included in the term "conveyance on sale"; and when I read this document it seems to me to come within the definition. The effect of the document is that Kaye thereby transferred to J. & P. Coats, Limited, ordinary shares in James Chadwick & Brother, Limited, in consideration for fully paid ordinary shares of J. & P. Coats, Limited. This seems to fall entirely within the definition given by Lindley L.J. in *Foster* v. *Inland Revenue Commissioners*. (1) When a document like this is looked at you must see what the substance of the transaction was, and the mere fact of the insertion of the words "in exchange for" will not alter the substance of the transaction. In my judgment, the substance of this transaction is a conveyance on sale within the Stamp Act. It is said it is not a conveyance on sale, but an exchange, and that it comes within s. 73 and within the schedule of the Act. My remark upon that is, if it be a conveyance on sale, which I hold it to be, it cannot be an exchange; so that it is not necessary to inquire into the exchange section of this Act. Sect. 73 by itself clearly does not apply to a case like this. It applies to an exchange, partition, or division relating to real estate. As to the words in the schedule, "in any other case," what they mean I need not decide now, and I may say at present I do not know what they are used for; but, at any rate, they do not apply to this case.

RIGBY L.J. I am of opinion that this is a case of conveyance on sale. Looking at the document itself we find, as has already been pointed out, that it is an undoubted transfer to J. & P. Coats, Limited, of shares in an undertaking called James Chadwick & Brother, Limited. So far there is no doubt it is a transfer, and there is a conveyance, within the meaning of the Act, of those shares. Now the consideration is certain shares of J. & P. Coats, Limited; but instead of saying "in consideration for," they say "in exchange for." Suppose they had struck out those words "in exchange," and left it simply "for fully paid ordinary shares," I venture to think no one would ever have dreamt that it was not a conveyance on sale.

(1) [1894] 1 Q. B. 516.

C. A. 1897

COATS v. INLAND REVENUE COMMISSIONERS.

Rigby L.J.

Putting in the words cannot make a difference, otherwise it would be possible, by the mere introduction of such words, to make that an exchange which without them would not be an exchange. If we go outside and see what led up to this, as pointed out by my brother Grantham in the Court below, when the shareholders were consulted they were asked to sell their shares, and the whole bargain went upon their selling their shares to J. & P. Coats, Limited. I agree that in the memorandum signed by them they call it an exchange, which idea is carried out in the transfer itself; but calling it so will not make it an exchange. The meetings of the company are to sanction a scheme for the sale of such shares; and this is a sale of shares. If it were necessary, I should say it was already decided in other cases; but I should have been disposed to decide it exactly the same way if those cases never existed. However the matter is approached, it is a sale and nothing else; otherwise I do not see how, whenever property is given for property, you should call it anything else than an exchange. In that view, I do not see what the meaning of s. 55 would be. In my view, the Court below were right in treating this transaction as a conveyance on sale, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for J. & P. Coats, Limited: *Linklater & Co.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. M.

In re BROSTER.
Ex parte PRUDDAH.

1897
May 18, 27.

County Court—Practice—High Bailiff—Fees—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 154, 160.

Where the high bailiff of a county court seizes goods under a warrant of execution, and subsequently distrains on other goods of the judgment debtor to satisfy a claim for rent made by the landlord under s. 160 of the County Courts Act, 1888, the execution and distress are to be treated as separate proceedings, and the high bailiff is entitled to a separate set of possession fees in respect of each proceeding.

APPEAL from a decision of the judge of the Birkenhead County Court, affirming the disallowance by the registrar of certain items in the high bailiff's bill of costs.

Under a judgment recovered in the county court against John Broster, a warrant of execution had been issued, and on December 22, 1896, the high bailiff levied on Broster's goods for 20*l.* 11*s.* 3*d.*; he remained in possession for five days in compliance with the requirements of s. 154 of the County Courts Act, 1888. On the following day the bailiff received from Broster's landlord a notice in writing, as required by s. 160 of the Act, stating that rent to the amount of 55*l.* was in arrear, and he thereupon seized further goods to cover the amount of rent in arrear, as required by that section. The bailiff remained in possession both under the warrant of execution and under the distress for rent until December 29, when he received notice that a receiving order had been made against Broster; the bailiff thereupon went out of possession and handed over the goods seized to the official receiver. Subsequently the high bailiff brought in his bill of costs, in which he claimed to be entitled to possession fees at the rate of 10*s.* a day for five days' possession under the execution, and to a further 10*s.* a day for five days' possession under the landlord's distress. The registrar allowed only 10*s.* for one day's possession under the distress, and disallowed the fees for the other four days on the ground that for that time the

1897

BROSTER, *In re.* PRUDDAH, *Ex parte.*

possession under the distress was concurrent with the possession under the execution, and that only one set of possession fees was allowable in respect of those days. The learned judge affirmed the decision of the registrar, and the high bailiff appealed.

Buckmaster, and *Lancelot Sanderson*, for the high bailiff. The learned county court judge was wrong. The very state of things that has here arisen is contemplated by s. 160 of the County Courts Act, 1888. The seizure by the bailiff by way of distress for the rent in arrear is in effect an execution against goods of the debtor not seized under the warrant of execution, and carries with it the right to fees and all the incidents of an execution. The judgment of the registrar was based upon the case of *In re Wells, Ex parte Sheriff of Kent* (1); but that decision is no authority, for it dealt with the case of a sheriff, whose fees are specified to be in respect of each building or place at which a seizure is made.

Muir Mackenzie, for the official receiver. The effect of the section is to put the distress for rent upon the footing of a second execution, and where two executions are levied by the sheriff against a debtor, there is nevertheless but one possession. The execution and the distress involve only a single sale: they are in truth but one proceeding. [He cited *Chambers* v. *Coleman*. (2)]

Cur. adv. vult.

May 27. VAUGHAN WILLIAMS J. This case raises, by way of a review of taxation, a question as to the meaning of s. 160 of the County Courts Act, 1888. There had been an execution against the debtor, and subsequently a claim of the landlord for rent, for which the high bailiff distrained under s. 160; so that in addition to the other sums of money to be discharged by the execution, money had also to be raised under s. 160 to discharge the claim of the landlord for rent. The high bailiff, by the bill of costs which he carried in, claimed to treat these two transactions as separate transactions entitling him to a double set of

(1) (1893) 68 L. T. 231. (2) (1841) 9 Dowl. 588.

fees; the judgment of the Court below refuses to allow the double fees claimed, and taxes the charges of the high bailiff upon the basis of there having been nothing more than one execution. The question is, what is the proper mode of taxation in circumstances of the kind?

In order to form a conclusion, we must look not only at s. 160, but also at s. 154 of the County Courts Act, 1888; it is better to first consider s. 160. That section says that the statute of Anne is not to apply, but that the landlord may make a claim for rent in arrear within five clear days of the levy, and if such claim be made, the bailiff making the levy is, in addition thereto—that is, in addition to the amount levied under the execution—to distrain for the rent so claimed and the costs of such distress, and is not within five days to sell any part of the goods taken, unless they are of a perishable nature, &c.; and the bailiff is afterwards to sell such of the goods under the execution and distress as shall satisfy firstly the costs of and incident to the sale, secondly the claim of the landlord (not exceeding a specified amount), and lastly the amount of the original execution for which the warrant was issued. The section then provides for the case of replevin, and for the appropriation of the overplus of the sale, and concludes thus: "and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the Court, and no other fees shall be demanded or taken in respect thereof." Then we turn to s. 154 to see what is the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under an execution. That section, after providing for the mode of execution and for the employment of persons to keep possession, and of sworn brokers and appraisers for selling and valuing the goods seized, proceeds thus: "and no goods taken in execution under this Act shall be sold for the purpose of satisfying the warrant of execution except by one of the brokers or appraisers so appointed, and the brokers or appraisers so appointed shall be entitled to have, out of the produce of the goods so distrained or sold, sixpence in the pound on the value of the goods for the appraisement thereof,

1897

BROSTER, *In re.* PRUDDAH, *Ex parte.*

Vaughan Williams J.

whether by one broker or more, over and above the stamp duty, and for advertisements, catalogues, sale and commission, and delivery of goods one shilling in the pound on the net produce of the sale." It may be noticed that in this section the words used are, "out of the produce of the goods so distrained or sold"; but the expression "distrained" does not seem strictly applicable to an execution, only to a distress. It is true that there are other proceedings than the landlord's distress by which the bailiff may distrain; but those are not referred to in the section, for they do not involve a sale of the goods.

The question we have to answer is whether the bailiff is entitled to a double set of fees; whether he may treat the proceedings as separate, and have one set of fees in respect of the execution, and another set in respect of the distress. The learned county court judge held that he was not so entitled; but I do not agree with him. I think that the bailiff was so entitled, and I think so because s. 160 seems, by the plain language which it contains, to treat the execution and the distress as different proceedings, and to give fees by way of remuneration to the high bailiff in respect of each transaction. And I may here point out that, if this were not so, the effect of Schedule A (which governs the scale of county court fees, and will be found at pp. 36 and 37 of the Annual County Court Practice for 1897) would be to deprive the high bailiff in many cases of all remuneration for a distress, because in that schedule we find it provided that "all poundage, except where otherwise herein specified, shall be estimated upon the amount or value of the subject-matter of the proceeding upon which it is payable, except where the said amount or value exceeds twenty pounds, when the poundage shall be estimated on twenty pounds only." The result would be that if there were an execution for 20*l.*, and a subsequent distress, the high bailiff would get no remuneration whatever for the distress, if the proceedings were not to be considered as separate proceedings. I think that the words of the section and the provision as to fees must lead us to the conclusion that the execution and distress are intended to be dealt with as separate proceedings for the purpose of calculating the poundage. The limit of 20*l.* applies to each of

the transactions—that is to say, the high bailiff gets sixpence in the pound under the execution on a sum not exceeding 20*l.*, and sixpence in the pound under the distress on a sum not exceeding that amount.

WRIGHT J. I agree.

Appeal allowed.

Solicitors for appellant: *J. E. & H. Scott, for Thompson, Hughes & Co., Birkenhead.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

W. J. B.

SIMMONS *v.* THE MALLING RURAL DISTRICT COUNCIL.

1897

May 19, 27.

Local Government — Local Authority—Powers—By-Laws — Rural Sanitary Authority—Cesspools in connection with Buildings—Application of By-law to old Buildings—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 23.

The power of a rural sanitary authority under s. 157 of the Public Health Act, 1875, as amended and extended to rural sanitary authorities by s. 23 of the Public Health Acts Amendment Act, 1890, to make by-laws with respect to (inter alia) cesspools in connection with buildings extends to old buildings in existence before the making of the by-law as well as to new buildings.

A by-law of a rural sanitary authority providing that "every person who shall construct a cesspool in connection with a building shall construct such cesspool at a distance of fifty feet at least from a dwelling-house" is not unreasonable merely by reason of the fact that in a particular case it is not possible to construct a cesspool at the prescribed distance.

CASE stated by justices of Kent.

The appellant appeared to answer an information charging him with having unlawfully constructed a cesspool in connection with a building at a distance of less than fifty feet from a dwelling-house, contrary to a by-law of the respondents, which was in the following terms: "Every person who shall construct a cesspool in connection with a building shall construct such

1897

SIMMONS v. MALLING RURAL COUNCIL.

cesspool at a distance of fifty feet at least from a dwelling-house or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business." The following facts appeared on the hearing of the information.

The appellant was the owner of a public-house, which was also his dwelling-house, and was situated within the district of the respondent council; it was an old building, which had been erected many years before, and until the month of October, 1896, it had two cesspools in connection with it situate about three feet from the house. One of these cesspools received the drainage from a urinal and two closets, the other received the sink-water. In October, 1896, after a notice from the inspector of nuisances, the appellant filled up the cesspools and substituted earth-closets for the existing closets; he also constructed one new cesspool, into which the drainage from the urinal and the sink-water, after it had passed through an intercepting trap, was conducted by underground earthenware pipes; no night-soil was discharged into the cesspool. This cesspool was seventeen feet from the appellant's house, and within eight feet of a stream adjoining his premises. The public-house was erected in a place which was not, at the passing of the Public Health Act, 1875, included in an urban sanitary district, and was erected many years before any order had been made under s. 276 of that Act extending the provisions of s. 157 to the district of the respondents: the urinal, closets, and sink had existed in the condition in which they were at the time of the alteration for many years prior to the service of the notice on the appellant.

The provisions of s. 157 of the Public Health Act, 1875, had been duly extended to the respondents' district, and in 1895 by-laws were made under that section by the respondents, and were duly allowed by the Local Government Board. Part III. of the Public Health Amendment Act, 1890, had been adopted by the respondents, though evidence of this fact was not given.

It was contended for the appellant that the by-law did not apply, because (1.) he had not constructed a cesspool in connection with which the by-law applied; (2.) he had not erected

a building within the respondents' district subsequently to the order of the Local Government Board by which s. 157 of the Public Health Act, 1875, was extended to the district; and (3.) the by-law was ultra vires, unreasonable, and void.

The justices convicted the appellant; the question for the Court was whether their determination was right in law.

Upon the first argument of the case the Court was of opinion that the question of the validity of the by-law was one of general importance, and directed notice of the proceedings to be given to the Local Government Board, in order that they might, if they thought fit, take part in the argument. (1)

Hohler, for the appellant. The by-law should not be read as applying to old buildings in existence at the time when it was made; if it does apply to old buildings, it is ultra vires. Sect. 23 of the Act of 1890 does not enable rural authorities to make such a by-law; sub-ss. 1 and 2 extend only to urban authorities, and enable them to make by-laws affecting old buildings; while sub-s. 3, which gives power to rural authorities to make by-laws as to certain matters, does not give them power to make by-laws as to buildings coming within the exception contained in s. 157 of the Act of 1875. In any event the by-law is unreasonable as applied to a rural district having no drainage system; not only does it apply to old buildings, but it lays down an arbitrary limit of distance with which in many cases it would be impossible to comply. [He cited *Waite*

(1) By 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 157, sub-s. 4, power is given to urban authorities to make by-laws with respect to (inter alia) cesspools in connection with buildings.

By 53 & 54 Vict. c. 59 (The Public Health Acts Amendment Act, 1890), s. 23, sub-s. 1, the provisions of s. 157 of the Act of 1875 are extended so as to empower urban authorities to make by-laws with respect to certain additional matters; by sub-s. 2, "any by-laws under that section as above extended with regard to . . . . cesspools in connection with buildings . . . . may be made so as to affect buildings erected before the times mentioned in the said section." By sub-s. 3, "The provisions of the said section (as amended by this Act) so far as they relate to by-laws with respect to . . . . the matters mentioned in sub-ss. 3 and 4 of the said section . . . . shall be extended so as to empower rural authorities to make by-laws in respect to the said matters, and to provide for the observance of such by-laws, and to enforce the same . . . ."

1897

SIMMONS v. MALLING RURAL COUNCIL.

v. *Garston Local Board* (1); *Heap* v. *Burnley Union* (2); *Tucker* v. *Rees.* (3)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) (*H. Sutton* with him), for the Local Government Board. The by-law is reasonable. The fact that the limit of fifty feet may operate hardly in a particular case is not sufficient to make it unreasonable; the question of the proper limit to be fixed is eminently one for those conversant with the circumstances of the particular district.

Macmorran, Q.C. (*Arthur Gill* with him), for the respondents. It is clear that under s. 23, sub-s. 2, of the Act of 1890 urban authorities have power to make by-laws as to cesspools in connection with old buildings, and it is equally clear that that power is extended by sub-s. 3 to rural authorities. The only question, therefore, is whether the by-law is reasonable. [On the latter point he cited *Slattery* v. *Naylor.* (4)]

Hohler, in reply.

Cur. adv. vult.

May 27. WRIGHT J. The question which we have had to consider in this case is as to the validity of a by-law made by the Malling Rural District Council under powers usually given to urban councils, and which were first applied to rural district councils by the Public Health Act, 1890. By-law 85, the one in question, is as follows: "Every person who shall construct a cesspool in connection with a building shall construct such cesspool at a distance of fifty feet at least from a dwelling-house or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business." There is no doubt that the building in the present case was a building in a public highway. Three objections have been taken to the by-law: first, that if properly read in connection with the rest of the by-laws, it does not apply to old buildings in existence at the time the by-law was made; secondly, that if it does apply to them, it is ultra vires, and not warranted by the Act of 1890; and, thirdly, that it is

(1) (1867) L. R. 3 Q. B. 5.
(2) (1884) 12 Q. B. D. 617.
(3) (1861) 25 J. P. 789.
(4) (1888) 13 App. Cas. 446.

unreasonable. As regards the first objection, it may be remarked that the language of the by-law is quite general; it is one of a bundle or fasciculus of by-laws headed "with respect to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings"; and, further, in other parts of the by-laws, where it is intended to restrict the application of any particular by-law to new buildings, the expression "new building" is used. I cannot see the slightest reason for cutting down the general application of this by-law.

The second objection seems to me wholly untenable. By s. 157, sub-s. 4, of the Public Health Act, 1875, powers were given to urban authorities to make by-laws with respect to the drainage of buildings, to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings, and other matters. This power did not extend to old buildings, and by s. 23 of the Public Health Act, 1890, s. 157 of the Act of 1875 was extended so as to empower urban authorities to make by-laws respecting certain things not specifically mentioned in the earlier Act, and sub-s. 2 of s. 23 expressly declares that "any by-laws under that section as above extended with regard to the drainage of buildings, and to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings . . . . may be made so as to affect buildings erected before the times mentioned in the said section." Then sub-s. 3 proceeds: "The provisions of the said section"—that is, s. 157 of the Act of 1875—"as amended by this Act"—that is, as extended to old buildings—"with respect to the matters mentioned in sub-ss. 3 and 4 of the said section . . . . shall be extended so as to empower rural authorities to make by-laws in respect to the said matters, and to provide for the observance of such by-laws." It is perfectly clear upon reading these provisions that the power to make such a by-law affecting old buildings was expressly extended to the case of rural district councils, and that this by-law is not ultra vires.

The third point, that the by-law is unreasonable, was the one that was most argued, and three reasons were given in favour of that view. First, it was said, that it must be held to be unreasonable from the fact that it applied to buildings already

1897

SIMMONS v. MALLING RURAL COUNCIL.

Wright J.

in existence at the time it was passed; but we cannot hold it unreasonable merely on that ground: Parliament has authorized the making of by-laws on these matters applicable to buildings already in existence, and it is not for the Court to say that such by-laws are unreasonable. Secondly, it was said that it was unreasonable because it fixed an arbitrary limit of fifty feet, and it was pointed out that it would have a hard effect in many cases, where that distance could not be obtained. It is obvious however that there must be some limit in the interest of public convenience and of certainty, and almost any limit might lead to hard consequences in particular cases. The discretion must rest with the sanitary authority to say what is a reasonable distance in the particular locality. Thirdly, it was said that the by-law was unreasonable, because its enforcement would lead to the destruction of property, for in places where there is no sewage system, and cesspools are a necessity, the value of a particular property would be absolutely destroyed if it were impossible for the owner to make a cesspool. But the short answer to that contention is that, if there is already no cesspool in existence, the by-law does not deprive the owner of his power of making one; if he has one, it does not compel him to close it; and that if he desires to shift the position of his cesspool, he must do so in accordance with the requirements of the by-law. Then it was contended that such a by-law would tend to prevent improvements, because if (for example) a man had a cesspool only two feet away from his house, and had not fifty feet of ground, the by-law would prevent his removing it and placing it thirty feet from his house. But I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement; it is the public interest as a whole which has to be considered. I think, therefore, that this appeal must be dismissed.

BRUCE J. I am of the same opinion, though at one time I felt some doubt about the case; I am however satisfied that this by-law is not unreasonable. It is reasonable that some arbitrary limit should be fixed, and the same inconvenience might arise

if it were fixed at ten feet as at fifty feet. The inconvenience suffered in the particular case does not make the by-law bad.

Appeal dismissed.

Solicitors for appellant: *Routh, Stacey & Castle, for Knocker, Knocker & Holcroft, Sevenoaks.*

Solicitors for respondents: *Kays & Jones, for H. D. Wildes, West Malling.*

Solicitors for Local Government Board: *Sharpe, Parker, Pritchards & Barham.*

W. J. B.

KERR *v.* KERR.

1897

May 14; *July* 21.

Bankruptcy—Proof—Alimony—Arrears accrued due before Receiving Order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37.

Arrears of alimony payable by a debtor to his wife under an order of the Probate and Divorce Division of the High Court of Justice, which accrue due before the making of a receiving order against the debtor, are not provable by the wife in the debtor's bankruptcy.

Per Hawkins and Vaughan Williams JJ. (Wright J. dissentiente).

APPEAL from a decision of the judge of the Westminster County Court.

The plaintiff, who was the wife of the defendant, had obtained a decree for judicial separation from her husband, and on May 2, 1893, an order was made in the Probate Division for payment by the defendant to the plaintiff of permanent alimony at the rate of 108*l.* per annum by monthly instalments. The payments of alimony fell into arrear, and eventually a judgment summons was taken out in the Westminster County Court by the plaintiff in respect of arrears amounting to 45*l.* On October 13, 1896, the summons was heard, and the learned judge, being of opinion that the defendant had the means to pay three instalments amounting to 27*l.*, made an order for his committal for fourteen days in respect of the non-payment of those instalments, but directed that it should remain in abeyance until December 1. On November 30 a receiving order was made against the defendant on his own petition; and on December 5 the defendant filed an affidavit in the county court under

1897

KERR v. KERR.

Order XXV., r. 30, of the County Court Rules, in which he set forth the fact that a receiving order had been made against him, and alleged that the debt in respect of which the order of commitment had been made was provable in bankruptcy. The registrar of the county court thereupon made an order staying the issue of a warrant of commitment. The plaintiff, who had not up to that time asked that a warrant of commitment should be issued, applied to the judge to rescind the registrar's order, and that she might be at liberty to have the order of commitment executed, on the ground that the debt in respect of which the order was made, being for arrears of alimony, was not provable under the bankruptcy. The learned judge, being of opinion that the principle of the decision in *In re Hawkins, Ex parte Hawkins* (1), applied to the case and was binding upon him, reversed the decision of the registrar, and made an order taking off the stay; but he further ordered that there should be a stay of proceedings pending an appeal from his decision, with liberty to the plaintiff to apply to take off the suspension. The defendant now appealed.

Powles, for the defendant. Arrears of alimony accrued due before the date of a receiving order are provable in bankruptcy. The question was not argued in *In re Hawkins, Ex parte Hawkins* (1), which was confined to arrears of alimony which became due after the making of the receiving order, although it is true that in his judgment in that case Vaughan Williams J. said that he did not see how there could be any proof for arrears of alimony incurred at any time. In *Linton* v. *Linton* (2), where the decision was that future payments of alimony not already accrued due were not provable in bankruptcy, Baggallay L.J. says: "Of course the case is very different with regard to the payments which became due before the bankruptcy and were not paid." From which it would appear that in that learned judge's opinion such arrears were provable in bankruptcy. The fact that methods are prescribed by which orders for alimony are to be enforced does not shew that there can be no proof in bankruptcy in respect of arrears due before the bankruptcy.

(1) [1894] 1 Q. B. 25. (2) (1885) 15 Q. B. D. 239.

Montague Lush, for the plaintiff. The learned county court judge was right, and these arrears are not a debt provable in bankruptcy. The Probate Division can refuse to enforce its own order for payment of alimony, which is allotted for the maintenance of a wife from year to year; the Court will therefore as a rule not enforce payment of more than one year's arrears: *Wilson* v. *Wilson* (1); *Watkins* v. *Watkins*. (2) From this it is clear that even arrears of alimony are not an absolute debt; there is no doubt an obligation created by the order of the Probate Division, but that Court keeps control over it. So thoroughly is this recognised that an order for final judgment under Order XIV. will not be made where the action is for arrears of alimony pendente lite payable under an order of that Court: *Bailey* v. *Bailey*. (3) These arrears are, therefore, not a debt within the meaning of s. 37, sub-s. 3, of the Bankruptcy Act, 1883; neither are they a liability within that sub-section, for they do not come within the description of "liability" in sub-s. 8; that sub-section, it is true, says that "liability" is to "include" certain things, but it is in fact a definition section, and would be useless unless so construed.

[WRIGHT J. Ought you not to go to the Bankruptcy Court under sub-s. 6 (4), and get an order that it is a debt not provable in the bankruptcy?]

No; for it is neither a debt nor a liability within that sub-section. There is no distinction in principle between arrears accruing due before the date of the receiving order, and arrears accruing due between the receiving order and the discharge; and the decision in *In re Hawkins, Ex parte Hawkins* (5), necessarily involved a decision as to arrears accrued due before the receiving order.

[WRIGHT J. The judgments in *Hardy* v. *Fothergill* (6),

(1) (1830) 3 Hagg. Eccl. 329, n.

(2) [1896] P. 222.

(3) (1884) 13 Q. B. D. 855.

(4) By 46 & 47 Vict. c. 52 (the Bankruptcy Act, 1883), s. 37, sub-s. 6, "If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy."

(5) [1894] 1 Q. B. 25.

(6) (1888) 13 App. Cas. 351.

1897

KERR v. KERR.

which was decided under an earlier Act, seem to shew that sub-s. 8 does not cut down sub-s. 3; that it merely includes certain things under the term "liability," and does not give an exhaustive definition of it.]

Powles, in reply.

Cur. adv. vult.

July 21. HAWKINS J. The judgment which is about to be read has been prepared by my brother Vaughan Williams, and I entirely concur in it. My brother Wright has written a separate judgment.

VAUGHAN WILLIAMS J. This is an appeal against the order of His Honour Judge Lumley Smith discharging the order of the registrar staying an order for commitment for non-payment of arrears of alimony payable by a husband to a divorced wife. We think the order of the county court judge right.

The order made by the Probate and Divorce Division was made under s. 1 of 29 & 30 Vict. c. 32; it was an order for payment of 9*l.* a month for permanent alimony.

It was decided by Cave J. in *Linton* v. *Linton* (1) that arrears of alimony accruing due after the adjudication were not provable in bankruptcy, and that an order under the Debtors Act, 1869, might be made, in a proper case, to enforce payment of such arrears. As a fact, in that case the wife had proved for the arrears of alimony due at the date of adjudication, but there was no judicial decision as to her right so to do. The decision purports to be a decision under 29 & 30 Vict. c. 32, s. 1. I do not understand how that section applied to a case of judicial separation, but this is unimportant, for the judgment undoubtedly was a judgment on the question of proof of debt for a sum payable under that section quâ alimony, i.e., quâ an allowance payable to a wife under a judicial separation, and *Watkins* v. *Watkins* (2) shews that it makes no difference if the sum is a periodical sum payable quâ maintenance to a divorced wife.

It follows that the only question to be decided in the present

(1) 15 Q. B. D. 239. (2) [1896] P. 222.

case is whether the decision in *Linton* v. *Linton* (1) applies to arrears payable at the date of the receiving order. Now the considerations which led the Court of Appeal to hold that there could be no proof for arrears which had become due since the receiving order seem to have been, that the sum payable was not a lump sum, but a payment to be made monthly or weekly; that the sum was payable out of personal earnings; that that which would go to the wife would take nothing from the creditors; that the payments could not be valued or have a capital value put upon them, because they might at any time be put an end to by resumption of cohabitation. These considerations, except the last, all apply to permanent maintenance under this Act. The last consideration, namely, the impossibility of valuation, also in our judgment applies, although the impossibility is based on different facts in the case of permanent maintenance for a divorced woman to those on which it is based in case of permanent alimony for a judicially separated wife. Resumption of cohabitation between man and wife is no longer possible after divorce. The parties no longer stand in that relation, but the uncertainty as to the continuance of the obligation to make the payment exists, and exists not only as to future payments, but also as to arrears; for the Divorce Division can and will wholly or partially relieve a husband from payment of arrears, if it is just to do so: *De Blaquière* v. *De Blaquière* (2); *Prescott* v. *Prescott*. (3) In fact, the practice of the Divorce Division so much treats the sums periodically payable under its order as a fund for maintenance and not as property, and so much keeps its hand on the obligation to make these periodical payments for maintenance, that it is a searching rule that the Court will not, in the absence of special circumstances, make an order enforcing more than one year's arrears. The very terms of s. 1 of 29 & 30 Vict. c. 32, moreover, shew that the Court has this power.

Further than this, s. 37, sub-s. 3, of the Bankruptcy Act, 1883, shews that a debt is equally provable whether the obligation arose before the receiving order or after it at any

(1) 15 Q. B. D. 239. (2) (1830) 3 Hagg. Ecc. 322.
(3) (1868) 20 L. T. 331.

1897

KERR v. KERR.

Vaughan Williams J.

time before discharge. It follows that *Linton* v. *Linton* (1) is an authority for the proposition that, so far as regards permanent alimony, there can be no proof for arrears arising between receiving order and application to prove, and is equally an authority in respect of arrears before receiving order, unless there is something in the nature of arrears arising before receiving order which makes it possible in such a case to form that estimate which the Court held in *Linton* v. *Linton* (1) could not be formed in respect of the subsequent arrears. It is to be observed that in *Linton* v. *Linton* (1) it was in respect of arrears, and not in respect of future liabilities, that it was said that an order could be made on a judgment summons on the ground that there could be no proof.

With regard to the case of *Hardy* v. *Fothergill* (2), there is undoubtedly in the judgment a good deal to make one say that the liability of a husband to pay under the order of the Divorce Division permanent alimony or permanent maintenance by periodical payments was a liability capable of being estimated; but the Court of Appeal in *Watkins* v. *Watkins* (3) do not suggest that anything in *Hardy* v. *Fothergill* (2) has overruled *Linton* v. *Linton* (1) or *In re Hawkins, Ex parte Hawkins* (4), and I am of opinion that the value of the liability, the continuance and extent of enforcement of which both as to the past and future is as entirely under the control of the Court making the original order for payment as this is, as these orders for alimony and permanent maintenance are, is and ought to be held incapable of being fairly estimated.

Vaughan Williams J. then read the following judgment of

WRIGHT J. If liberty of the person were not in question, I should not have thought it necessary to express the doubt which I entertain. But, as the matter stands, I think it right to say that in my opinion this case is governed by *Hardy* v. *Fothergill* (2), and we ought to hold that arrears of alimony accrued due and payable before the receiving order are prov-

(1) 15 Q. B. D. 239.
(2) 13 App. Cas. 351.
(3) [1896] P. 222.
(4) [1894] 1 Q. B. 25.

able in the bankruptcy, unless the Court has declared them incapable of valuation.

1897

KERR v. KERR.

Appeal dismissed.

Solicitor for plaintiff: *The Official Solicitor.*
Solicitor for defendant: *H. Westbury Preston.*

W. J. B.

KERRISON *v.* SMITH.

1897
Aug. 3.

Licence—Revocation—Breach of Contract by Licensor—Licensee's Right of Action.

Plaintiff and defendant agreed orally that defendant should let his wall to plaintiff, for bill-posting, at 2*l.* 10*s.* a year, plaintiff to erect a hoarding, on which the bills were to be posted. Plaintiff erected the hoarding, posted bills, and made several payments. Defendant gave notice to plaintiff that the hoarding must be removed, and nearly a month later defendant took it down.

In an action to recover damages for breach of contract:—

Held, that, although the permission to post bills was a licence, and therefore, not being by deed, was revocable, the action was maintainable for breach of contract, and therefore plaintiff was wrongly nonsuited.

Wood v. *Leadbitter*, (1845) 13 M. & W. 838, distinguished.

APPEAL by the plaintiff from the decision of the judge of the county court of Surrey holden at Wandsworth, in a case tried before him with a jury.

The plaintiff was a bill-poster, and the defendant kept the Bull Inn at Barnes. The plaintiff sued to recover damages for breach of an oral agreement, by which the defendant agreed to let his wall to the plaintiff for 2*l.* 10*s.* per annum, for the purpose of posting advertisements, one of the terms being that the plaintiff should erect in front of the wall a hoarding, on which his advertisements were to be posted. In the conversation which took place between the parties the word "let" was used, and two receipted bills were produced, one of which contained the words, "Mr. Kerrison debtor to Smith; To letting of wall 2*l.* 10*s.*"; and the other the words, "Received the sum of 2*l.* 10*s.* up to end of October, 1896." It appeared that the plaintiff had posted his advertisements for some time, and had

1897

KERRISON v. SMITH.

made payments to the defendant from time to time when requested. On November 23, 1896, the defendant sent a letter to the plaintiff requiring him to remove his hoarding and advertisements, and on November 28 a second letter to the same effect was sent. The hoarding and advertisements not having been removed, the defendant, on December 17, 1896, caused them to be taken down and sent to the plaintiff.

The county court judge held that the permission, given to the plaintiff by the agreement, to post the advertisements, amounted only to a licence, which the defendant, on the authority of *Wood* v. *Leadbitter* (1), was entitled to revoke, and therefore the plaintiff had no cause of action, and he directed a nonsuit.

Turrell, for the plaintiff, in support of the appeal. The county court judge was wrong in directing a nonsuit, for the decision on which he professed to act, *Wood* v. *Leadbitter* (1), is no authority against the claim of the plaintiff in the present case to recover damages for breach of contract. On the contrary, in that case Alderson B., in delivering the judgment of the Court, while he leaves the point open, uses language favourable to the view that, under such circumstances as those of the present case, where the plaintiff has paid money to the defendant for the right to post bills, an action founded on a breach of contract could be maintained. (2) Also in *Wells* v. *Kingston-upon-Hull Corporation* (3) counsel for the defendants distinctly raised the point (4) which is relied on for the defendant in the present case, and that point was dealt with by Lord Coleridge C.J. (5) in language favourable to the present plaintiff's contention. As the plaintiff has been prevented from proving his case and shewing what damage he has suffered by reason of the defendant's breach of contract, it is obvious that there must be a new trial. Although the plaintiff may not be able to prove a contract amounting to an actual demise, still

(1) 13 M. & W. 838.

(2) 13 M. & W. at p. 855, quoted by Collins J., post, p. 448–449.

(3) (1875) L. R. 10 C. P. 402.

(4) L. R. 10 C. P. at p. 405.

(5) L. R. 10 C. P. at p. 409, quoted by Collins J., post, p. 449.

the contract will be subject to the terms of a yearly tenancy, so far as such terms can be applicable, and therefore the usual term as to notice in the case of a yearly tenancy would apply. Even if the permission to post advertisements amounts only to a licence, the wrongful revocation of such licence gives a cause of action. [He also referred to *Vaughan* v. *Hampson*. (1)]

Joseph Randolph, for the defendant. The county court judge was right in acting on the authority of the decision in *Wood* v. *Leadbitter* (2), which has often been approved and followed. All the authorities shew that a licence such as was given to the plaintiff is revocable, whether consideration has been given for it or not: *Fentiman* v. *Smith* (3); *R.* v. *Horndon-on-the-Hill* (*Inhabitants*) (4); *Hewlins* v. *Shippam* (5); *Bryan* v. *Whistler*. (6) No doubt before a licence can be revoked reasonable notice must be given to the licensee: *Cornish* v. *Stubbs* (7); *Mellor* v. *Watkins* (8): but that has been done here, for as early as November 23, 1896, the defendant wrote requiring the removal of the advertisements, and he did not remove them himself until December 17, nearly a month later. The plaintiff, therefore, was given a reasonable time in which to remove them.

Turrell, in reply, referred to *Rymer* v. *McIlroy*. (9)

LAWRANCE J. I am of opinion that the learned county court judge was wrong in the conclusion at which he arrived. He ought to have gone on with the trial, in order to ascertain what the contract really was which had been entered into between the parties. He appears to have thought that, on the authority of *Wood* v. *Leadbitter* (2), he could not go on further with the case. His view was that there was only a licence to put up the advertisements, and that, the licence having been revoked, there was an end of the whole case. I have come to the conclusion that this view was wrong. There is no case

(1) (1875) 33 L. T. (N.S.) 15.
(2) 13 M. & W. 838.
(3) (1803) 4 East, 107.
(4) (1816) 4 M. & S. 562.
(5) (1826) 5 B. & C. 221.
(6) (1828) 8 B. & C. 288.
(7) (1870) L. R. 5 C. P. 334, at p. 339, per Willes J.
(8) (1874) L. R. 9 Q. B. 400, at p. 405, per Blackburn J.
(9) [1897] 1 Ch. 528.

1897

KERRISON v. SMITH.

Lawrance J.

among all the authorities which have been referred to that is exactly on all fours with that now before the Court. In all the cases cited for the defendant the decisions proceeded on the ground that there was only a licence, which could be revoked; but there is no case in which the point was specifically taken which is now taken before us, namely, that an action will lie to recover damages for revoking a licence. I am of opinion, therefore, that the county court judge was wrong, and that he should have allowed the plaintiff to prove the contract on which he relied, and to give evidence of such damage as he could shew to have arisen from the breach of such contract by the defendant. Our decision, therefore, must be in favour of the plaintiff's contention, and the action must go back to the county court for a new trial.

COLLINS J. I am of the same opinion. The county court judge has assumed that the right to revoke a licence, which unquestionably exists on the authority of *Wood* v. *Leadbitter* (1), was enough to decide the present case against the plaintiff. The case was considered in the Court below on the footing that there was a licence and nothing more. It was conceded that the grantor has a right to revoke a licence, but the point set up by the plaintiff, that there was a contract, for the breach of which the plaintiff was entitled to recover damages, was never properly dealt with. There appears to be no case in which the point has been specifically raised and decided, as to whether there is a right to maintain an action for breach of contract, if a licence is revoked, although there is a right to revoke the licence, but on principle it seems to me that the two rights are compatible with one another. In delivering the judgment of the Court of Exchequer in *Wood* v. *Leadbitter* (2), Alderson B. expressed himself as follows: "It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the

(1) 13 M. & W. 838. (2) 13 M. & W. 838, at p. 855.

ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil." This language leaves the point open; but it seems rather like a suggestion that such a cause of action might be successfully supported. In *Wells* v. *Kingston-upon-Hull Corporation* (1), the defendants allowed ships to be repaired in their dock, under certain printed regulations, and the plaintiff verbally agreed with the defendants for the use of the dock, upon the terms of such regulations. The regulations provided that the dock should be "let," and that vessels should be allowed to enter according to the order of entry in the defendants' book, and further contained provisions tending to shew that the defendants intended to retain possession of and control over the dock while in use by vessels. In an action for breach of contract in not admitting the plaintiff's vessel in her turn, it was held that the contract was not for an interest in land, and therefore need not be in writing, and, secondly, that it need not be under the seal of the corporation. The point as to the licence was certainly taken on behalf of the defendants in that case (2); and the argument was dealt with by Lord Coleridge C.J. (3), holding that the contract was not a demise. He said: "Here I think the defendants did not intend to confer any interest in land, though they did give plaintiff a right to go on to the land in order to carry out the contract. I do not think we are called on to discuss the nice question raised upon the effect of *Wood* v. *Leadbitter* (4) in Mr. Cave's ingenious argument, viz., as to whether the plaintiff was a licensee without an interest, and so must fail, because the licence had been revoked; or a licensee with an interest, and so the licence, being irrevocable, amounted to an interest in land. The dilemma suggested does not, as I think, arise. The contract did not relate to the possession or enjoyment of the land or any right over it, but only to the use of it under very stringent regulations, the defendants retaining

(1) L. R. 10 C. P. 402.
(2) L. R. 10 C. P. at p. 405.
(3) L. R. 10 C. P. at p. 409.
(4) 13 M. & W. 838.

1897

KERRISON v. SMITH.

Collins J.

themselves complete possession of and all rights over it." That seems to narrow down the right of the plaintiff there to a licence. Therefore the actual decision is favourable to the plaintiff in the present case. There is another case which seems to be very much in point—*Butler* v. *Manchester, Sheffield and Lincolnshire Ry.* (1), in the Court of Appeal. There the plaintiff was a passenger by the defendants' railway under a contract, by which he was to produce his ticket when required, but, having lost the ticket, was unable to produce it. In an action for assault in forcibly removing him from the carriage, it was held, that the contract did not by implication authorize the defendants to remove the plaintiff on his failing to produce a ticket and refusing to pay the fare as required by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable. That was an action of tort; and it would seem that what the plaintiff had was merely a licence, and that the defendants could determine such licence, on the authority of *Wood* v. *Leadbitter* (2), which was referred to in the argument; but the learned judges seem to suggest that it might be a breach of contract to revoke the licence. Lord Esher M.R. said (3): "What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me, a contractual relation. It was alleged that the contract was for a right to go on the defendants' land in the nature of an easement, but that, there being no grant of an easement under seal, there was only a licence given by the defendants to go on their premises, which they could revoke. All I will say with regard to that contention is that, though it may have been quite right for the defendants' counsel to suggest the point, it seems to me when considered to be contrary to good sense." Lindley L.J. said in the same case (4): "It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to treat the case as one of a revocable licence. It is a case of a contract for carriage. The doctrine of *Wood* v. *Leadbitter* (2) does not appear to me to be at all applicable to the case of such a con-

(1) (1888) 21 Q. B. D. 207.
(2) 13 M. & W. 838.
(3) 21 Q. B. D. at pp. 210, 211.
(4) 21 Q. B. D. at p. 213.

tract." The judgment of Lopes L.J. is to the same effect. It is clear, therefore, that the Court did distinguish *Wood* v. *Leadbitter* (1) from the case then before them. The other cases which were cited on behalf of the defendant are not authorities to shew that an action might not be maintained for the revocation of a licence. In Clerk and Lindsell on the Law of Torts, 2nd ed. p. 302, the law is stated as follows: "Such a licence, even though it may have been made by deed and for valuable consideration, is revocable at any time by the licensor; the licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor, where the revocation is wrongful, is upon the contract." In the case which I put in the course of the argument of a licence to fish a salmon river, giving up the fish caught to the owner, could it be contended that immediately after receiving payment in consideration of granting the licence to fish, the owner could revoke it? For the reasons which I have given I am clearly of opinion that the mere fact that the licence was revoked is not enough to defeat the plaintiff's claim as it was put forward in the present case. It follows that the plaintiff was wrongly nonsuited, and there must be a new trial.

Judgment for the appellant.
Leave to appeal granted.

Solicitors for plaintiff: *Seeley & Son.*
Solicitors for defendant: *Maitlands, Peckham & Co.*

(1) 13 M. & W. 838.

P. B. H.

1897
July 29.

HATTON *v.* TREEBY.

Bicycle—Arrest of Rider—Justification—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 85.

A constable who sees a person riding a bicycle at night without a proper light, contrary to the provisions of s. 85 of the Local Government Act, 1888, has no power to stop him for the purpose of ascertaining his name and address.

CASE stated by justices.

On January 17, 1897, the respondent, a policeman, while on duty in the parish of Keynsham, in the county of Somerset, at about 10 P.M. saw the appellant approaching him riding a bicycle which had no light attached to it, as required by s. 85 of the Local Government Act, 1888. The respondent called to the appellant to stop, and upon the appellant's failing to do so caught hold of the handle-bar of the bicycle, whereby the appellant was thrown to the ground. The appellant thereupon summoned the respondent for assault. The justices found that the respondent did not know the name or address of the appellant, and could not have ascertained his name or address in any other way than by stopping him, and that in so stopping him he used no more force than was necessary. They were of opinion that as the appellant was committing an offence punishable on summary conviction within view of the respondent, the latter was justified in stopping him as he did in order to prevent a continuance of the offence and for the purpose of ascertaining his name and address, and they accordingly dismissed the complaint subject to a case for the opinion of the Court.

Avory (*H. H. Gregory* with him), for the appellant. The respondent could not at common law justify stopping the appellant in the way he did, for except in cases of felony or suspected felony, or in cases of breaches of the peace, constables cannot by the common law arrest without warrant. The question whether he had under the circumstances any statutory power to stop the appellant depends on the con-

struction to be put on s. 85 of the Local Government Act, 1888, and ss. 78, 79 of the Highway Act, 1835. Sect. 78 of the latter Act makes certain acts on the part of drivers of carriages offences, punishable with a penalty of 5*l.* in case the driver be not the owner of the carriage, and 10*l.* in case he be the owner, and provides that, "Every such driver offending in either of the said cases shall and may by the authority of this Act with or without any warrant be apprehended by any person who shall see such offence committed, and shall be conveyed before any justice of the peace."

And by s. 79: "Whereas offences may be committed against this Act by persons whose names are unknown to the surveyor assistant surveyor or district surveyor . . . . it shall be lawful for the surveyor &c. . . . or any other person witnessing the commission of the offence without any other authority than this Act to seize and detain such unknown person who shall commit such offence and take him forthwith before a justice of the peace."

By s. 85 (1) of the Local Government Act, 1888, bicyles are declared to be carriages within the meaning of the Highway Acts; and it is made an offence during the period between one hour after sunset and one hour before sunrise to ride a bicycle without a light, such offence being punishable with a penalty of forty shillings. No power is given by that Act to detain an offender. And the fact that a bicycle is declared to be a carriage within the Highway Act does not make the offence created by s. 85 of the later Act an offence against the earlier Act, so as to apply to it the provisions as to apprehension. It is altogether a new offence with a different penalty. It is immaterial that the constable had no other means of ascertaining the appellant's name and address. In *Jones* v. *Owen* (2), where the plaintiff, the driver of a cart, was, contrary to the

(1) By s. 85 of the Local Government Act, 1888, "Bicycles, tricycles, velocipedes and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts; and the following additional regulations shall be observed by any person or persons riding or being upon such carriage:—

"(*a*) During the period between one hour after sunset and one hour before sunrise, every person riding or being upon such carriage shall carry attached to the carriage a lamp."

(2) (1823) 2 D. & R. 600.

1897

HATTON v. TREEBY.

provisions of an Act of Parliament, riding on the shaft of the cart, and the defendant, who did not know the plaintiff's name, requested the plaintiff to move from in front of the board on which the name of the owner of the cart was written, and upon the plaintiff's refusal to do so forcibly moved him from in front of the board in order that he might see the name of the owner, and through him ascertain the plaintiff's name with a view to instituting a prosecution under the statute, it was held that the defendant could not justify his act.

J. A. Foote, for the respondent. If a constable has no power to stop the rider of a bicycle who is infringing the provisions of the Local Government Act, then those provisions are in the great majority of cases wholly nugatory. The regulations prescribed by the Local Government Act ought to be read into the Highway Act, in which case the power of apprehension thereby given applies.

COLLINS J. I am of opinion that this appeal must be allowed. The case finds that the appellant was riding a bicycle at ten o'clock at night in the month of January without having a lamp attached to the bicycle as required by s. 85 of the Local Government Act, 1888. The respondent, a constable, called upon him to stop for the purpose of obtaining his name and address. He failed to do so, and the question is whether that failure justified the constable in stopping him in the manner in which the case finds that he did. There can be no doubt that the constable had no power to stop him at common law, and the only question is whether he had any statutory authority to do so. It was contended that he had by virtue of the joint operation of ss. 78, 79 of the Highway Act, 1835, and s. 85 of the Local Government Act, 1888. Sect. 78 of the former Act deals with a variety of offences by drivers of carriages on highways, punishable with a penalty not exceeding 5*l.* or 10*l.* according as the drivers are or are not the owners of the carriages, and provides that the offenders may be apprehended without warrant by any person witnessing the offence. But the offences there dealt with do not include the driving of a carriage at night without a light. And s. 79 provides that "whereas offences may be committed against this Act by

persons whose names are unknown," any person witnessing the commission of the offence may seize and detain the offender and take him before a justice of the peace. But that provision is limited to the cases of offences "against this Act." So far that statute affords no justification of what the respondent here did. But then comes s. 85 of the Local Government Act, which declares bicycles to be carriages within the meaning of the Highway Acts, and provides certain additional regulations with respect to them, one of such regulations being that riders of bicycles shall carry lights at night subject to a penalty not exceeding forty shillings. That section did not give to a constable or other person witnessing an offence against it any power to detain the offender. But it was contended that that section, including the offences created by it, ought to be read into the Highway Act, 1835, so as to make the offence of riding a bicycle at night without a light an offence against that Act, and, consequently, bring it within the operation of the provisions as to apprehension. With that contention we cannot agree. Were we so to hold, we should in reality be drafting a new section. The Local Government Act, no doubt, brings bicycles within the operation of the Highway Act to this extent, that it makes the offences thereby created applicable to bicycles as well as to other kinds of carriages. But there the extension of the Highway Act stops. The Legislature, whether intentionally or not, has omitted to extend the power of detention to the new offences created by the Local Government Act.

RIDLEY J. I am of the same opinion. To hold that the Legislature intended to apply the provisions of the Highway Act as to apprehension to the offences created by the later Act would be to introduce language into the later Act which is not there.

Appeal allowed.

Solicitors for appellant: *Hirst & Sandford, Bristol.*

Solicitors for respondent: *Ford & Ford, for Wansbrough & Co., Bristol.*

J. F. C.

1897
Aug. 4, 5, 6.

[IN THE COMMERCIAL COURT.]

RUABON STEAMSHIP COMPANY, LIMITED *v.* LONDON ASSURANCE.

Insurance, Marine—Ship Docked for Repairs—Ship Surveyed while in Dock for Lloyd's Classification—Apportionment of Dock Charges and Expenses.

During a voyage covered by a policy underwritten by the defendants a vessel sustained damage, and was subsequently put into dry dock for the purpose of effecting repairs. The survey of the vessel for the purpose of renewing her classification in Lloyd's Register was not due for some months, but the owners took advantage of her being in dry dock to have the survey made, and her classification was renewed:—

Held, that the dock expenses, so far as they were common to the repairs and to the survey, ought to be apportioned in equal moieties between the owners and the underwriters.

Marine Insurance Co. v. *China TransPacific Steamship Co.*, (1886) 11 App. Cas. 573, followed.

Action tried in the Commercial Court before Mathew J. without a jury.

The plaintiffs' claim, as indorsed upon the writ, was for 2*l.* 5*s.*, being balance due in respect of a loss of 82*l.* 5*s.* under a marine policy of insurance for 2000*l.*, dated November 16, 1895, on the steamship *Ruabon* subscribed by the defendants. It appeared that whilst so insured and while upon a voyage from Kustendje to England the *Ruabon* ran aground and suffered considerable damage. She was taken to Cardiff, where, in January, 1896, she was put into dry dock for the purpose of having average repairs effected, in respect of which the underwriters were admittedly liable. In November, 1896, it would have been necessary for the *Ruabon* to be docked and surveyed in order to retain her No. 1 classification at Lloyd's, and the owners took advantage of the vessel being in dock for repairs to have her surveyed by Lloyd's surveyor; she was accordingly surveyed and retained her classification. An average statement was duly prepared, shewing the amount due from underwriters to be 822*l.* 14*s.* 10*d.*, of which the defendants' proportion was 82*l.* 5*s.*; this included various sums for towage,

pilotage, boatage, dock dues, and painting the ship's bottom. The defendants declined to pay the full amount of their proportion under the average statement on the ground that, as the vessel underwent her reclassification survey at the same time as the average repairs were effected, the cost of docking, painting, &c., should be divided between owners and underwriters. The plaintiffs contended that the vessel went into dock solely for the purpose of effecting the average repairs, and that therefore the underwriters were liable for the whole of the above charges. Ultimately the defendants paid a sum of 80*l.*, and the plaintiffs brought this action to recover the balance.

The following joint admissions were made for the purposes of the action :—

1. That the vessel in fact passed her No. 1 classification survey of Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to examine her bottom to see if reclassification repairs were necessary. This admission (together with admissions Nos. 2 and 3) was made subject to the following qualification : " But not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey."

2. That docking was necessary for the vessel to pass such survey.

3. That the specified items of expenditure were necessarily incurred in connection with the docking.

4. That such items were proper charges for the work done.

Cohen, Q.C., and *Montague Lush*, for the plaintiffs. The plaintiffs are not liable to contribute to the dry dock expenses, which were rendered necessary by the damage sustained by the vessel. Such expenses primarily fall on the underwriters, and there is nothing in the present case to take it out of the general rule. It is no answer to the plaintiffs' claim to say that they have gained the advantage of not having to put the vessel into dry dock in nine months' time for the purpose of her classification survey, for she might have been lost before that time arrived. The present case is distinguishable from *Marine*

1897

RUABON STEAMSHIP COMPANY v. LONDON ASSURANCE.

Insurance Co. v. *China TransPacific Steamship Co.* (1); in that case the vessel was put into dry dock, not for repairs for which the underwriters were liable, but for the purpose of being scraped and painted and generally made in a fit state for a voyage; having been put into dock for the owners' purposes, the owners were held liable for half the expenses. The result of that decision is that where the dock is intentionally used for a double purpose the expenses should be shared between the owners and underwriters; but here the dock expenses were incurred solely in respect of the repairs, and it was not until after the vessel was in dock that it occurred to the owners that she might be surveyed. It was not necessary at that time to put her in dry dock for the survey.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. This case is covered by the decision in *Marine Insurance Co.* v. *China TransPacific Steamship Co.* (1) The intention with which the vessel was put into dry dock is immaterial; the question is whether the plaintiffs derived a benefit from the survey being made while the vessel was in dry dock for repairs. The reclassification of the vessel was not urgent and could have been deferred: it was done for the owners' convenience, and they have derived a benefit for which the underwriters ought not to pay. The contract of assurance is only one of indemnity; but the plaintiffs are endeavouring to get for nothing the benefit of a survey, which if made at the ordinary time they must have paid for.

Cohen, Q.C., in reply.

Cur. adv. vult.

Aug. 6. The following written judgment was delivered by

MATHEW J. This was an action brought to recover the balance of expenses alleged to have been incurred by the plaintiffs in the repair of a ship of the plaintiffs insured by the defendants. The vessel in the course of her voyage sustained damage by perils insured against, and in order to make the repairs it became necessary to place the ship in dry dock. The vessel had been classed A 1 at Lloyd's, and the time for her survey and examination for the purpose of renewing her

(1) 11 App. Cas. 573.

classification had not arrived, but by the rules of Lloyd's Register the owner was entitled to anticipate the time and call for a survey while she was in dry dock. After the vessel had been opened up for the purpose of the repairs, the survey was held and the vessel's class was renewed.

The plaintiffs called upon the defendants to pay the whole expense of putting the vessel into dry dock as a necessary part of the cost of repairs. The defendants contended that the plaintiffs were bound to contribute to this expense as an outlay from which the plaintiffs had derived material benefit. The defendants relied upon the judgment in the case of *Marine Insurance Co.* v. *China TransPacific Steamship Co.* (1) Counsel for the plaintiffs sought to distinguish this case upon the following grounds. In the first place it was said that the expense was not necessarily incurred by the plaintiffs. But in my judgment necessity in such a case must be measured by commercial rule. No prudent owner would allow his ship to lose her class because of the consequent damage to her character and capacity as an instrument for earning freight. The outlay was as necessary as the one of scraping and painting in the case of *Marine Insurance Co.* v. *China TransPacific Steamship Co.* (1) Then it was said that the vessel need not have been put in dry dock for the purpose of survey, because the usual time had not arrived. But under Lloyd's rules the owner was entitled to call for the survey, and it might therefore be said that the time for renewing the vessel's class had arrived. So far as the underwriters were concerned their position was the same as if the survey was held at the exact date, and the owner would have been imprudent if he had neglected so favourable an opportunity for having the survey made.

It was next argued that the case was unlike *Marine Insurance Co.* v. *China TransPacific Steamship Co.* (1), because the operations for the repair and for the survey of the ship, though concurrent, were not of the same character. But the survey of the ship required time and skill and outlay, and the operation in that respect was analogous to the time, skill, and outlay required for the repairs of the ship. Then it was contended that the survey was only "incidental," and I agree that for

(1) 11 App. Cas. 573.

1897

RUABON STEAMSHIP COMPANY v. LONDON ASSURANCE.

Mathew J.

outlay made upon the ship in operations that might have taken place equally well while the vessel was not in dry dock the owners ought not to be called upon to contribute. But here the survey could not be held elsewhere than in dry dock, and the case is within the principle as stated by Fry L.J. in that case in the following terms: "Where the circumstances are such that there are two persons, each of whom has a distinct object in view, which he can only accomplish at a certain expense, and if both these persons concur together, they can each accomplish their separate object at the same expense as would have been incurred by each of them if they had done it separately, there, it appears to me, the simple ordinary rule—the rule of justice and equity—is that the total expense which has been incurred by their doing their acts together, and which would have been incurred by each if they had done it separately, shall be divided between them. This appears to me to be one of the cases to which the well-known maxim that 'equality is equity' applies; and, therefore, treating the assured in the present case as if they were two persons, it seems to me the reasonable thing is, to attribute one moiety of the dock dues for the three days to the enterprise of cleaning the bottom of the ship, and the other moiety to the enterprise of repairing the stern-post."

It was said that a judgment for the defendants would give them an advantage at the expense of the owners. But the true view of the case seems to me to be that if the plaintiffs' claim was admitted, they would recover more than an indemnity in the saving of part of the expense which they must have incurred in order to secure a renewal of the vessel's class. I agree with the argument of the defendants that the case is covered by the decision in the House of Lords, and I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Hornby, Cardiff.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

In re GINGER.
Ex parte LONDON AND UNIVERSAL BANK.

1897
May 24.

Bankruptcy—Reputed Ownership—Bill of Sale—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-s. iii.—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

Where the grantor of a bill of sale has become bankrupt before making any default in payment of the sums thereby secured, his possession of the goods assigned by it under such circumstances that he continues to be the reputed owner thereof is a possession by him with the consent of the true owner within the meaning of s. 44, sub-s. iii., of the Bankruptcy Act, 1883.

APPEAL from the decision of the county court judge of Bedfordshire.

On February 28, 1896, Ginger, a dairy-farmer, gave to the London and Universal Bank, Limited, as security for an advance, a bill of sale over his furniture, stock, cows, calves, horses, &c. The principal of the sum advanced and interest thereon were to be repaid as follows: 75*l.* on May 28, and the remainder on August 28, 1896. The bill of sale was duly registered.

On March 20, 1896, Ginger gave to the bank, as security for a further advance, a further bill of sale over his crops, tenant-right, and goodwill of his farm.

This bill of sale was registered on March 27, 1896.

On April 9, 1896, a bankruptcy petition was presented against Ginger, on which a receiving order was made on April 20. At that time there had been no default in the payment of the principal and interest secured by the two bills of exchange, and the bankrupt continued in the occupation of his farm, and in the carrying on of the trade or business of a dairy-farmer thereon.

On May 11 he was adjudicated bankrupt; and his estate was sold as a going concern, and the proceeds paid into court.

On August 13 the liquidator of the bank, which had been

1897

GINGER, *In re.* LONDON AND UNIVERSAL BANK, *Ex parte.*

wound up by order of the Court, applied in the county court for a declaration that the bank was at the commencement of the bankruptcy entitled to the chattels and property comprised in the two bills of sale, and to enforce the security accordingly against the money in court.

The county court judge found that the goods comprised in the two bills of sale on the bankrupt's farm in his trade or business at the commencement of the bankruptcy were in his possession, order, and disposition by the consent and permission of the true owner within the meaning of the Bankruptcy Act, 1883, s. 44, sub-s. iii., and held that the proceeds of them in court formed part of the estate of the bankrupt divisible among his creditors.

As to the furniture in the house not being in the possession of the bankrupt in his trade or business; the things affixed to the freehold; and the tillages, grass, and crops; he held that the doctrine of reputed ownership did not apply; and he made a declaration that the liquidator of the bank was entitled to the proceeds in court representing these items.

The liquidator appealed.

Jelf, *Q.C.*, and *Muir Mackenzie*, for the appellant. The county court judge was wrong. In order that the reputed ownership clause (s. 44 of the Bankruptcy Act, 1883) should apply, the goods must be at the time of the bankruptcy in the possession of the bankrupt "by the consent and permission of the true owner." Here the goods were in the possession of the bankrupt by virtue of s. 7 of the Bills of Sale Act, 1882. Until default had been made by the grantor of the bill of sale, the grantee had no power to take possession of the goods. There can be no consent where there is no power to refuse consent. The object of the reputed ownership clause was to prevent deceit by a trader from the visible possession of property to which he was not entitled; and in order to render the possession void there must be an unconscientious permission by the true owner of such possession by the trader: *Joy* v. *Campbell* (1);

(1) (1804) 1 Sch. & Lef. 328.

Colonial Bank v. *Whinney*. (1) No doubt if the bankrupt had made default in payment of the principal and interest secured by the bill of sale, and the grantee of the bill had abstained from seizing the goods, the reputed ownership clause would apply, because the grantee would by the default have become the true owner of the goods; but so long as he has no power to take possession he is not the true owner. *In re Stanley* (2) is a decision entirely in favour of this view, and it is not really disapproved in *In re Webber, Ex parte Slater*. (3)

[They also cited *In re Mills' Trusts*. (4)]

Herbert Reed, Q.C., and *Carrington*, for the respondent. The county court judge was right. He has given the appellant all the goods comprised in the bills of sale which were not trade goods, because the reputed ownership clause only applies to goods in the possession of the bankrupt in his trade or business. No distinction can be drawn between actual and conventional possession. A person lending money on a bill of sale consents to all the legal incidents of the transaction, and, therefore, by the bill of sale itself the consent of the true owner of the goods is given to the retention of possession of them by the grantor. The point is really decided by *Freshney* v. *Carrick* (5) and *Spackman* v. *Miller*. (6)

[They also cited *In re Chapple, Ex parte Izard* (7); *Swift* v. *Pannell* (8); *In re Wallis, Ex parte Sully*. (9)]

Jelf, Q.C., replied.

VAUGHAN WILLIAMS J. In this case the question that we have to determine is this: By s. 44 of the Bankruptcy Act, 1883, it is provided that all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be comprised in the property of the

(1) (1886) 11 App. Cas. 426.
(2) (1885) 17 L. R. Ir. 487.
(3) (1891) 64 L. T. R. 426.
(4) [1895] 2 Ch. 564.
(5) (1857) 1 H. & N. 653.
(6) (1862) 12 C. B. (N.S.) 659.
(7) (1883) 23 Ch. D. 409.
(8) (1883) 24 Ch. D. 210.
(9) (1885) 14 Q. B. D. 950.

1897

GINGER, *In re.* LONDON AND UNIVERSAL BANK, *Ex parte.*

Vaughan Williams J.

bankrupt divisible among his creditors. In 1882 the Bills of Sale Act (1878) Amendment Act, 1882, was passed; and the suggestion is made in this case that the effect of the passing of that Act of 1882 is that, if any one takes a bill of sale as a security for an advance and complies with the provisions of that Act, and, therefore, allows the possession of the articles comprised in the bill of sale to be kept by the grantor of the bill of sale until there is such default on his part as will allow the grantee to seize and take possession of those goods consistently with the provisions of s. 7 of that Act, the possession by the grantor of such goods will no longer be a possession by consent of the true owner, but will be a possession by the grantor by reason of the statute, and not by the consent and permission of the true owner. In my judgment, the proper answer to that is that, notwithstanding the provisions of the Act of 1882, the possession by a bankrupt of goods assigned by a bill of sale under such circumstances that the bankrupt continues to be the reputed owner thereof is a possession by the bankrupt with the consent of the true owner, and cannot be treated as a statutory possession by the grantor under the provisions of the Bills of Sale Act, 1882. Nobody suggests that we are to read the reputed ownership clause in the Bankruptcy Act of 1883 as in any way controlled by the Bills of Sale Act, 1882. Both statutes are of equal force, and it cannot be argued that one statute controls the other. I therefore take exception to the statement that we have here to decide a question of construction. The construction of the Bankruptcy Act, 1883, is absolutely unaffected by that of the Bills of Sale Act, 1882. The question is really one of evidence. The grantor of a bill of sale remains in possession of the goods comprised in it, and the suggestion is that he is in possession of those goods under such circumstances as to be the reputed owner thereof. If the Act had not been passed, and there was merely a bill of sale in the statutory form, the conclusion would be that if the surrounding circumstances led one to the inference that the goods remained in the possession of the bankrupt with the consent of the true owner he would be the reputed owner thereof. Of course, if the surrounding circumstances do not raise the presumption of

reputed ownership, cadit quæstio. In order to raise such a presumption the possession of the goods by the bankrupt must be by the consent of the true owner. I have only now to deal with the case where the possession is such as to raise the presumption of reputed ownership.

Apart from the bill of sale, no one would hesitate to say that the possession of the bankrupt here was such as to bring the case within s. 44 of the Bankruptcy Act. Then, what difference does the bill of sale make? It is said that, because the Act of Parliament requires a certain form to be used and prescribes certain consequences of giving a bill of sale, that negatives the presumption that the possession of the grantor is by the consent of the true owner. I do not see why that should be so. The Bills of Sale Acts apply to all classes of persons. The reputed ownership clause of the Bankruptcy Act in effect only applies to traders. It speaks of the goods as being in the possession, order, or disposition of the bankrupt "in his trade or business." It is therefore quite clear that, notwithstanding the Bills of Sale Act and the construction which we may put on it, there will be many cases in which bills of sale will enure for the benefit of the grantee despite the subsequent bankruptcy of the grantor.

It is plain that, with regard to such goods as the grantor includes in a bill of sale and which are not goods in his trade or business, the bill of sale will continue to operate; and even with regard to some goods which may be in the grantor's possession in his trade or business, they may be of such a character that a custom will override the presumption of reputed ownership. Every one who is familiar with bankruptcy law knows that there are customs in certain trades for wholesale dealers in various kinds of property to let the retail dealer have possession of such property under such circumstances that every one in the trade knows that the retail dealer is not the true owner of it.

There are, therefore, numerous cases in which the bill of sale is in the statutory form and has all the statutory consequences and yet the reputed ownership clause will not operate, but will remain inapplicable, because although the goods are in the

1897

GINGER, *In re.* LONDON AND UNIVERSAL BANK, *Ex parte.*

Vaughan Williams J.

possession of the bankrupt with the consent of the true owner, yet the possession is not under such circumstances as bring the case within the reputed ownership clause.

The conclusion to which I come is that in each case, notwithstanding the provisions of the Bills of Sale Act, 1882, the question will be, Is the possession by the bankrupt a possession by consent of the true owner, and under such circumstances that the bankrupt is the reputed owner of the goods? It seems to me that, although the Bills of Sale Act compels the grantee to allow the grantor to remain in possession of the goods, it does not in any sense compel him to consent to a false reputation of ownership. If the surrounding circumstances are not such as to raise a reputation of ownership on the part of the grantor of the bill of sale, then the enforced consent by the grantee to the possession of the goods does no harm, and the reputed ownership clause does not apply. But if the surrounding circumstances are such as to raise the reputation of ownership on the part of the grantor, then the grantee must go further, and take such steps as are necessary to negative the reputation of ownership.

Here there is a finding of fact by the county court judge that the surrounding circumstances were such as to raise the reputation of ownership on the part of the grantor of the bills of sale, and therefore, in my opinion, the grantee was bound to take steps to negative that reputation. In my opinion the decision of the county court judge was right, and must be affirmed.

As to the Irish case which has been cited, *In re Stanley* (1), I will only say that the decision there seems to have been based on two grounds, one of which was that the possession was consistent with the terms of the mortgage deed and excluded the reputation of ownership. There are, however, a whole series of cases in the English courts—of which *Spackman* v. *Miller* (2) is an example—which negative that ground, and under the circumstances I do not think that we are bound to follow that decision.

(1) 17 L. R. Ir. 487. (2) 12 C. B. (N.S.) 659.

1897

GINGER, *In re.* LONDON AND UNIVERSAL BANK, *Ex parte.*

WRIGHT J. I am of the same opinion. There is nothing in the Bills of Sale Act, 1882, to exclude the operation of the reputed ownership clause, unless it be that by s. 7 the consent of the true owner to the possession is done away with. But I think, on the authority of *Spackman* v. *Miller* (1), that we must hold that the consent of the true owner to the goods remaining in the possession of the grantor is given by the bill of sale itself.

No doubt s. 7 of the Bills of Sale Act, 1882, recognises that a bill of sale is enforceable in bankruptcy; but that can only mean to give the grantee of a bill of sale an effective power of seizure in cases where the reputed ownership clause does not apply.

I agree that the Irish case of *In re Stanley* (2) is inconsistent with *Spackman* v. *Miller*. (1)

Appeal dismissed. Leave to appeal given.

Solicitors: *Gibson, Usher & Co.; Leslie & Hardy, for H. Pettit, Leighton Buzzard.*

(1) 12 C. B. (N.S.) 659.

(2) 17 L. R. Ir. 487.

A. P. P. K.

1897
Aug. 10, 11.

THE QUEEN *v.* BURTON AND ANOTHER, JUSTICES. *Ex parte* YOUNG.

Justices — Disqualification — Interest — Probability of Bias — Prosecution by Council of Incorporated Law Society—Adjudication by Ordinary Member of Society—Attorneys and Solicitors Act, 1874 (37 & 38 *Vict. c.* 68), *s.* 12.

On the hearing of a summons for falsely pretending to be a solicitor, contrary to s. 12 of the Attorneys and Solicitors Act, 1874, a magistrate, who was a practising solicitor, and an ordinary member of the Incorporated Law Society, sat and adjudicated. The proceedings were taken by the council of the Incorporated Law Society, who alone had power to direct prosecutions, ordinary members having no control over the proceedings of the society.

On the argument of an order nisi for a certiorari to quash the conviction :—

Held, that the circumstances did not shew any probability of bias on the part of the magistrate, that he was not disqualified by his membership of the Incorporated Law Society, either as having a pecuniary interest in the proceedings, or as being a prosecutor, and therefore he was justified in adjudicating.

AN order nisi had been granted, calling upon two justices of Tunbridge Wells to shew cause why the conviction of one Alfred Young for wilfully and falsely pretending to be a solicitor (1) should not be brought up and quashed, on the ground that Mr. Burton, one of the justices, was disqualified from adjudicating upon the case.

The facts disclosed by the affidavits, so far as material for the purpose of this report, were as follows.

The proceedings were taken in the name of the chief constable of Tunbridge Wells, but were in fact initiated by the council of the Incorporated Law Society, by whom the solicitor for the prosecution was instructed. Mr. Burton, one of the two magistrates before whom the case was heard, was a practising

(1) By the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, "Any person who wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is duly qualified to act as, a solicitor, or that he is recognised by law as so qualified, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding the sum of 10*l.* for each such offence."

1897

REG. v. BURTON. YOUNG, *Ex parte.*

solicitor, and was an ordinary member of the Incorporated Law Society, but was not a member of the council of the society. The proceedings of the society were controlled by the council alone, and ordinary members had no voice in them, and had no control over the institution or conduct of prosecutions. At the hearing the defendant Young was represented by a solicitor, who was then aware that Mr. Burton was a practising solicitor, but did not ascertain until after the hearing that he was a member of the Incorporated Law Society. No objection was taken at the hearing to Mr. Burton adjudicating, and at the conclusion the solicitor for the defendant applied to the magistrates to state a case. It appeared that in prosecutions of this kind no part of any penalty that might be imposed was ever received by the Incorporated Law Society. The magistrates convicted the defendant, and imposed a penalty of 40*s*.

Hollams shewed cause. There is no ground for any of the objections taken to Mr. Burton's right to sit as a magistrate. It is clear that he was acting in good faith, and there is no evidence of any bias in fact, nor is there anything in the circumstances of the case to shew that he could reasonably be suspected of bias. The fact that he was a practising solicitor could not disqualify him, and in any case that objection was waived by the action of the solicitor for the defence, in taking no objection at the hearing, and applying for a case to be stated. Membership of the Incorporated Law Society cannot of itself cause disqualification, and it is shewn that only the council of the society have any control over the direction of prosecutions. An ordinary member, as Mr. Burton was, would have no voice in the matter. This distinguishes the present case from *Reg.* v. *Henley* (1), where the magistrate sat at the meeting of the board of conservators at which the prosecution was resolved upon. *Reg.* v. *Huggins* (2) is also distinguishable, for there the magistrate was himself a licensed pilot, one of a small class for whose protection the proceedings were taken. *Leeson* v. *General Council of Medical Education and Registration* (3) and *Allinson* v. *General Council of Medical Education*

(1) [1892] 1 Q. B. 504. (2) [1895] 1 Q. B. 563.
(3) (1889) 43 Ch. D. 366.

1897

REG. v. BURTON. YOUNG, *Ex parte.*

and Registration (1) are authorities against the contention of the present applicant. The decision most nearly in point is *Reg.* v. *Deal Corporation, Ex parte Curling* (2), which is in principle undistinguishable from the present case.

Hextall, in support of the order nisi. The proceedings in cases such as the present are taken for the protection of the profession of solicitors, and a practising solicitor ought not to act as a magistrate in such a case; there would be at least a risk of bias.

[LAWRANCE J. That objection seems to have been waived.]

Mr. Burton was disqualified as a member of the Incorporated Law Society. If the society were dissolved he would be entitled to a share of the assets, and if the result of the prosecution were that the society was condemned in costs, that share would be to some extent diminished; therefore he had a pecuniary interest, and, no matter how small such interest may be, if it exists it disqualifies: *Reg.* v. *Gaisford.* (3) He was further disqualified because the proceedings were taken by the Incorporated Law Society, and he, as a member of that society, was a prosecutor, and therefore was not entitled to sit and act as judge in the case. The authorities which have been cited support the applicant's contention. [He also referred to *Company of Mercers and Ironmongers of Chester* v. *Bowker* (4); *Reg.* v. *Hammond* (5); *Reg.* v. *Allan* (6); *Reg.* v. *Fraser.* (7)]

LAWRANCE J. In this case Mr. Hollams shewed cause against an order nisi, directed to two justices of Tunbridge Wells, for a writ of certiorari, to remove and quash the conviction of one Alfred Young, who was convicted of the offence of falsely pretending to be a solicitor. It appears that Young wrote a letter stating that he was instructed to sue for the recovery of a debt. The proceedings were taken in the name of the chief constable of Tunbridge Wells, but were in fact conducted by the Incorporated Law Society. Mr. Burton, who

(1) [1894] 1 Q. B. 750.
(2) (1881) 45 L. T. (N.S.) 439.
(3) [1892] 1 Q. B. 381.
(4) (1725) 1 Str. 639.
(5) (1863) 9 L. T. (N.S.) 423.
(6) (1864) 4 B. & S. 915.
(7) (1893) 9 Times Rep. 613.

is a practising solicitor, sat on the bench, and took part in the decision, and the order was moved for on the ground that Mr. Burton was interested in the proceedings, and was therefore disqualified from acting as a magistrate. On the question of disqualification I entirely agree with Wills J., who said in *Reg.* v. *Huggins* (1): "It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness. . . . . It is far safer to enlarge the area of this class of objections to the qualification of justices than to restrict it." In the present case we have to decide a very important question, that is, whether Mr. Burton was so interested as to be disqualified from acting as a magistrate. One of three circumstances must be present in order to disqualify a magistrate from acting. In the first place, if there were any bias, or a strong probability of bias, the magistrate would be disqualified; but in the present case there is no suggestion that Mr. Burton was not acting bonâ fide. It is said however that from the fact that he was a practising solicitor, a strong probability arises that a bias would exist, and in support of this contention the case of *Reg.* v. *Huggins* (2) was relied on. There a magistrate, who was a licensed pilot, was held to be disqualified from acting in the case of a summons against an unqualified pilot for assuming and continuing in the charge of a ship after a qualified pilot had offered to take charge of her. The ground of that decision, as was pointed out by Wills J., was, that the magistrate belonged to a small class of privileged persons, for whose protection the proceedings were taken. That ground cannot apply to the present case. Another ground of disqualification would be interest. It is contended that Mr. Burton was interested, because he was a member of the Incorporated Law Society. It is suggested that he had a pecuniary interest, because he was a subscriber to the Incorporated Law Society, and the society might possibly be dissolved, and the assets divided among the members, in which event,—although in such cases as the present the penalties do not go to the society,—still if the society were condemned in costs, some pecuniary loss would be occasioned to an ordinary member, and

(1) [1895] 1 Q. B. 563, at p. 565. (2) [1895] 1 Q. B. 563.

1897

REG. v. BURTON. YOUNG, *Ex parte.*

LAWRANCE J.

it was pointed out that, however small such loss might be, still, if any pecuniary interest existed, it would be sufficient to cause disqualification. The dissolution of the society is a most unlikely contingency; but the real answer to Mr. Hextall's contention on that point is given by the decision in *Reg.* v. *Deal Corporation* (1), where it was held that magistrates who were subscribers to a branch of the Society for the Prevention of Cruelty to Animals were not disqualified from taking part in the hearing of a case in which the prosecution had been directed by the secretary of the society. In that case Field J. pointed out that the members had no control over, or responsibility for, any prosecution by the society. In the present case also the fact of being a member of the Incorporated Law Society gives no power to institute or take part in prosecutions, and therefore Mr. Burton had no power with regard to the direction or management of the prosecution. This also answers an argument based on the third ground of disqualification suggested, when it is said that if a magistrate has taken any leading part in the prosecution he cannot act, according to the well-known rule that a man cannot be prosecutor and judge in the same case. The decision cited in support of that contention was *Reg.* v. *Henley* (2), where a magistrate had been present at a meeting of a board of fishery conservators, at which it was proposed and resolved to institute a prosecution. That decision proceeded on the ground that the magistrate sat to hear and determine the prosecution, which, at the meeting of the board, he and the other members had ordered to be instituted. It is further contended that, because the Incorporated Law Society was the prosecutor, and Mr. Burton was a member of the society, he was disqualified from acting as a magistrate. That contention is dealt with, and disposed of, by the judgment of the Court of Appeal in *Allinson* v. *General Council of Medical Education and Registration.* (3) In my opinion all the circumstances of the present case shew that there was no bias or probability of bias, and no interest, and that Mr. Burton was not engaged in the prosecution, so as to disqualify him

(1) 45 L. T. (N.S.) 439. (2) [1892] 1 Q. B. 504.
(3) [1894] 1 Q. B. 750.

1897

REG. v. BURTON. YOUNG, *Ex parte.*

from acting as a magistrate at the hearing. The case therefore does not come within any of the grounds of objection which have been put forward, and the order nisi for a certiorari must be discharged.

COLLINS J. I am of the same opinion. It is contended that Mr. Burton was disqualified from acting as a magistrate on the ground of interest. That contention is divided into two heads. First it is contended that his being a practising solicitor disqualified him, and secondly that his being a member of the Incorporated Law Society had the same effect. This second head of objection is further subdivided into two, for it is contended that Mr. Burton was both judge and prosecutor, and further that he had a pecuniary interest in the matter. The first objection, that he was a practising solicitor, was waived, for the fact was known to the solicitor for the defence, and the objection was not taken, but the solicitor asked that a case might be stated. Therefore the question as to his being a practising solicitor is eliminated. Then there comes the objection that he was in the position of prosecutor as well as judge. This must depend on his relation to the Incorporated Law Society. He was a country subscriber, and the affidavits shew that all prosecutions are directed by the council. It follows, therefore, that Mr. Burton took no part in directing the prosecution. That, however, of itself is not enough. In *Allinson* v. *General Council of Medical Education and Registration* (1), which is the leading case on this point, Lord Esher M.R. lays down the rule as follows: "In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed." After thus stating the rule the Master of the Rolls slightly qualifies the language of Mellor J. in *Reg.* v. *Allan.* (2) The conclusion arrived at in *Allinson* v. *General Council of Medical Education and*

(1) [1894] 1 Q. B. 750, at pp. 758, 759. (2) 4 B. & S. 915, at p. 926.

1897

REG. v. BURTON. YOUNG. *Ex parte.*

Collins J.

Registration (1) was that Dr. Philipson, who had taken part in the inquiry as to the plaintiff's conduct, could not be reasonably suspected of being biassed, and all that was said in that case could fairly be said here. The action was tried before me without a jury, and I held that Dr. Philipson was not disqualified from acting on the council, and refused an injunction, and that judgment was affirmed, after full argument, by the Court of Appeal. In my opinion in the case of Mr. Burton there is, if possible, less objection to his acting than there was to Dr. Philipson in the case to which I have last referred. This disposes of the objection that Mr. Burton acted as both prosecutor and judge. As to the objection on the ground of pecuniary interest, though I agree that, however small the interest may be, if it exists it will disqualify, still it must not be a purely speculative chance, as it is here, depending on an event which could not with any probability happen in Mr. Burton's lifetime, namely, the dissolution of the Incorporated Law Society, in which event it is urged that Mr. Burton would come in for a smaller share of assets if the society had to pay the costs of this prosecution. This contention is dealt with by the judgments of Field and Cave JJ. in *Reg.* v. *Deal Corporation.* (2) In the present case I can find no evidence of any pecuniary interest on the part of Mr. Burton.

Order discharged.

Solicitors for applicant: *Lee, Ockerby & Everington, for E. Elvey Robb, Tunbridge Wells.*

Solicitor for Incorporated Law Society: *E. W. Williamson.*

(1) [1894] 1 Q. B. 750. (2) 45 L. T. (N.S.) 439.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1897
Aug. 6.

KING *v.* EVERSFIELD.

Landlord and Tenant—Tenancy from Year to Year—"Contract of Tenancy"—Market Gardeners' Compensation Act, 1895 (58 & 59 *Vict. c.* 27), *s.* 4—*Agricultural Holdings* (*England*) *Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 61.

By an agreement dated October 22, 1886, the owner of a piece of land let the same to a tenant from September 29, 1886, at the rent of 19*l.* 12*s.* a year, payable quarterly on the four usual quarter-days for payment of rent in every year, and the tenant agreed to pay the said rent at the times aforesaid, and to use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner, and it was agreed that the tenancy might be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case might be, on any day of the year. The land so let was used by the tenant as a market garden. In October, 1896, the landlord gave the tenant notice to quit. The tenant claimed compensation for improvements under s. 4 of the Market Gardeners' Compensation Act, 1895, which is to be read as part of the Agricultural Holdings (England) Act, 1883:—

Held, that the agreement created a tenancy from year to year, and therefore the tenant came within s. 4 of the Market Gardeners' Compensation Act, 1895, as having held under a "contract of tenancy" as defined by s. 61 of the Agricultural Holdings (England) Act, 1883.

Doe v. *Grafton*, (1852) 18 Q. B. 496, commented on.

Appeal from an order of a Divisional Court (Day and Lawrance JJ.) reversing an order made by the judge of the Sussex County Court as after-mentioned.

The appellant King had been tenant to Mrs. Eversfield, the respondent, of certain land used by him as a market garden under a written agreement in the following terms: "An agreement made October 22, 1886, between Mrs. Isabella Eversfield of the one part, and Alfred King hereinafter called the tenant of the other part, whereby the said Isabella Eversfield lets and the tenant hires from September 29, 1886, a piece of ground forming part of the Sheep Field, St. Leonard's-on-Sea, now in the tenant's occupation, containing 4A. 3R. 24P., or thereabouts, at the rent of 19*l.* 12*s.* a year payable quarterly on the four usual quarter-days for payment of rent in every year, and the tenant agrees to pay the said rent at the times aforesaid, and to

C. A. 1897

KING v. EVERSFIELD.

use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner, and it is hereby agreed that the said tenancy may be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case may be, on any day of the year." On October 14, 1896, Mrs. Eversfield gave King notice to quit. He claimed compensation under the Market Gardeners' Compensation Act, 1895, s. 4. for improvements effected before the commencement of the Act, and appointed a referee to determine the amount of the compensation due to him. Mrs. Eversfield declined to appoint a referee. King thereupon applied to the county court judge to appoint one under s. 9, sub-s. 6, of the Agricultural Holdings (England) Act, 1883. The county court judge held that the agreement constituted a letting from year to year, and therefore King held under a "contract of tenancy" as defined by s. 61 of the Agricultural Holdings (England) Act, 1883, and consequently came within the terms of s. 4 of the Market Gardeners' Compensation Act, 1895. He accordingly appointed a referee. On appeal to the Divisional Court they reversed his decision. (1)

Channell, Q.C., and *J. F. P. Rawlinson*, for the appellant. The question is whether the appellant is such a tenant as is entitled to compensation under s. 4 of the Market Gardeners'

(1) By the Market Gardeners' Compensation Act, 1895, s. 1, the Act "shall be read and construed as part of the Agricultural Holdings (England) Act, 1883, hereinafter called the principal Act, as amended by the Tenants' Compensation Act, 1890."

By s. 4: "Where under a contract of tenancy current at the commencement of this Act a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding, as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

By the Agricultural Holdings (England) Act, 1883, s. 61: "In this Act 'contract of tenancy' means a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year"; and "'tenant' means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year."

Compensation Act, 1895, as having held under a "contract of tenancy" as defined by s. 61 of the Agricultural Holdings (England) Act, 1883. The tenancy constituted by the agreement was a tenancy from year to year. The rent reserved was 19*l.* 12*s.* a year, and the tenancy lasted more than ten years. The provision that it might be determined by a three months' notice to quit at any time did not prevent it from being a yearly tenancy: *In re Threlfall.* (1) A tenancy for a term of years would be none the less a tenancy for a term of years, because it was subject to a defeasance by notice before the expiration of the term.

[They were stopped by the Court.]

Levett, Q.C., and *Boxall*, for the respondent. This was not a tenancy from year to year. There must be a tenancy for a year certain in the first instance in order to constitute such a tenancy: see Preston on Conveyancing, 3rd ed. vol. iii. pp. 76, 77; Burton on Real Property, 8th ed. p. 280; Williams on Real Property, 17th ed. p. 463. It is not disputed that, if there were a yearly tenancy which continued for several years, it might then be described as a term of years; and it may be that the fact that such a tenancy is subject to a defeasance by a three months' notice would not prevent its being a tenancy from year to year. But there is no tenancy for a year created by this agreement. No definite period is mentioned, and the tenancy might be determined in three months and a day from its commencement. At the most it was a quarterly tenancy, which might be determined by three months' notice on any day. The fact that the tenancy lasted for more than ten years is immaterial. So might a weekly tenancy. For the purposes of s. 61 of the Agricultural Holdings (England) Act, 1883, it is the period for which the land was let originally, not that for which it has been held, that must be regarded. *Kemp* v. *Derrett* (2) and *Doe* v. *Grafton* (3) are authorities to shew that this was not a tenancy from year to year. In *In re Threlfall* (1) the tenancy created by the attornment clause in the mortgage deed was expressly stated to be from year to year.

(1) (1880) 16 Ch. D. 274. (2) (1814) 3 Camp. 509.
(3) 18 Q. B. 496.

C. A. 1897

KING v. EVERSFIELD.

LORD ESHER M.R. The only question which we have to decide is whether upon the true construction of the agreement in this case the appellant was such a tenant that the county court judge had jurisdiction upon his application to appoint a referee to settle the differences between the parties under the Market Gardeners' Compensation Act, 1895. This agreement was made in October, 1886, and under it the appellant has held the land until recently; but it is contended that he is not a tenant within the Act. By the agreement Mrs. Eversfield let, and the tenant hired, certain land "at the rent of 19*l.* 12*s.* a year, payable quarterly on the four usual quarter-days for payment of rent in every year, and the tenant agreed to pay the said rent, and to use the land as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner." The tenant therefore agreed to pay a yearly rent, though payable quarterly, and, if the agreement stopped there, in my opinion, the appellant would clearly have been a yearly tenant. But then there comes the provision for determination of the tenancy by a three months' notice on any day in the year. That was a provision which might not be acted upon, and was not in the present case acted upon, until after the lapse of several years. The case is not at all like the case of a mere letting for three months. I cannot agree with the contention that this provision as to notice entirely alters the nature of the tenancy which upon the construction of the previous part of the agreement would be created by it. In my opinion the county court judge was right in holding that the tenancy of the appellant was a tenancy from year to year, and therefore the judgment of the Divisional Court was wrong, and this appeal should be allowed.

A. L. SMITH L.J. I also think that the judgment of the county court judge was right. When the Market Gardeners' Compensation Act, 1895, came into operation, the appellant was in occupation of the land in question, and was using it as a market garden. Notice was given to terminate that holding, and he thereupon claimed compensation under the Act; and, inasmuch as the respondent did not appoint a referee to deter-

C. A. 1897

KING v. EVERSFIELD.

A. L. Smith L.J.

mine the question of compensation, application was made to the county court judge to appoint one. The point taken is that the appellant was not a tenant who came within the meaning of the Market Gardeners' Compensation Act, 1895, s. 4, and therefore was not entitled to apply for the appointment of a referee. Whether he was so or not depends upon the question whether at the commencement of the Act he held under a "contract of tenancy" as defined by s. 61 of the Agricultural Holdings (England) Act, 1883. There can be no doubt that the agreement under which he held was a "contract of tenancy" in the ordinary sense of the term, but the Agricultural Holdings (England) Act, 1883, s. 61, defines "contract of tenancy" as meaning "a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year." It seems to me, speaking for myself, that the meaning of the Legislature was that a tenant should not be entitled to compensation under the Act if his tenancy was less than a tenancy from year to year. The question therefore is whether the agreement of October 22, 1886, constituted a tenancy from year to year or something less than such a tenancy. By that agreement the landlord lets and the tenant hires the land "at the rent of 19*l.* 12*s.* a year, payable quarterly on the four usual quarter-days for payment of rent in every year." The terms of this agreement so far import a tenancy from year to year. But it is contended that the tenancy is cut down to a quarterly tenancy by the subsequent provision for its determination by a three months' notice to quit on any day of the year. I do not agree with that contention. It is conceded that, if the tenancy had been expressly stated to be from year to year, then, notwithstanding the provision for a three months' notice, the respondent must fail; but I can see no distinction for this purpose between an agreement which expressly mentions a tenancy from year to year, and one which, like the agreement here, by necessary implication points to such a tenancy. The question is whether, upon the true construction of the agreement taken as a whole, it creates a quarterly tenancy at a rent calculated at the rate of so much a year, with a provision for a three months' notice to quit, or a tenancy from year

C. A. 1897

KING v. EVERSFIELD.

A. L. Smith L.J.

to year at a yearly rent with a provision for a three months' notice to quit. I think the latter is the true construction. In the case of *In re Threlfall* (1) Cotton L.J. said: "I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever notice they like." I agree with the view there expressed, which is applicable to the present case. I think that the agreement of tenancy in this case constituted a yearly tenancy with a special term that it should be determinable by a three months' notice at any time. It follows that the appellant's case comes within the terms of s. 4 of the Market Gardeners' Compensation Act, 1895.

RIGBY L.J. This case turns upon the construction of the agreement of October 22, 1886, under which the appellant held certain land at the time when the Market Gardeners' Compensation Act, 1895, came into operation. By that agreement Mrs. Eversfield let and the tenant hired the land described from September 29, 1886, at a rent of 19*l.* 12*s.* a year payable quarterly on the four usual quarter-days for payment of rent in every year. The parties therefore contemplated, not that only one quarter's rent might become payable, but that a yearly rent would be paid as stipulated, not only in one year but in every year of the tenancy. The tenant agreed to pay the rent at the times aforesaid, and to use the premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner. It is clear, from the terms so used, that the parties were contemplating, not merely a tenancy for three months, but that the tenant should cultivate and gather the fruits of the land as a yearly tenant. So far, it appears to me that the true construction of the agreement is that it is one for a tenancy from year to year. Then comes the clause upon which the respondent relies as cutting down the tenancy that would otherwise be created. In the absence of any authority constraining me to do so, I should decline to accept the view that that clause prevents the tenancy from being that which on the construction of the previous part of the document it would

(1) 16 Ch. D. 274.

appear to be. Two authorities were cited to us in support of the respondent's contention, namely, *Kemp* v. *Derrett* (1) and *Doe* v. *Grafton*. (2) In each of these cases the question really was whether the notice to quit which had been given was a good notice or not. The parties had agreed in plain terms what notice was to be sufficient, and I feel a difficulty in following the argument in these cases. It seems to have been to the effect that, the tenancy being a tenancy from year to year, it followed that, whether the parties agreed to the contrary or not, it could only be put an end to by such a notice as the law ordinarily requires in the case of such a tenancy, and the parties could not vary the character of the notice requisite by agreement. In *Doe* v. *Grafton* (2) Lord Campbell used certain expressions upon which the respondent's counsel relied, but they appear to me to be merely obiter dicta, and on the other hand there is the case of *In re Threlfall* (3), by which we are bound as being a decision of the Court of Appeal. It was there laid down that the parties to a tenancy from year to year may agree to any terms they like with regard to the notice to quit. It was attempted to distinguish that case from the present on the ground that there a tenancy from year to year was expressly mentioned, but I do not think that constitutes any valid distinction. It is a clear authority that a stipulation for a three months' notice to quit is not inconsistent with a yearly tenancy. There is nothing, so far as I can see, in the Agricultural Holdings (England) Act, 1883, to the effect that a tenancy from year to year cannot be within the Act, unless it possesses every incident of an ordinary tenancy from year to year. It seems to me clear that the appellant held under a contract of tenancy within the meaning of the Act, and therefore this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Langham, Son & Douglas.*

Solicitors for respondent: *Savery & Stevens, for Mann & Knight, Hastings.*

(1) 3 Camp. 509.

(2) 18 Q. B. 496.

(3) 16 Ch. D. 274.

E. L.

1897
July 31.

LONDON COUNTY COUNCIL *v.* WOOD.

Locomotive—Passing through County—Licence—Highways and Locomotives Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 32.

The Highways and Locomotives Act, 1878, provides by s. 32 that "A county authority may . . . . make . . . . by-laws for granting annual licences to locomotives used within their county." And by a by-law made by the London County Council under that section it was provided that "No locomotive shall be used on any highway within the county of London until an annual licence for the use of the same shall have been obtained from the council by the owner thereof":—

Held, that a steam-roller which was not at the time being employed in road-making, but was merely passing through the county to a destination outside, was being "used within the county" within the meaning of the section and the by-law.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellants against the respondent, charging him with having on November 3, 1896, at High Street, in the parish of Eltham, in the county of London, unlawfully used on the highway a locomotive for which no annual licence had been obtained from the appellants by the owner thereof, in contravention of a by-law made by the appellants in that behalf.

By s. 32 of the Highways and Locomotives Act, 1878, "A county authority may from time to time make alter and repeal by-laws for granting annual licences to locomotives used within their county and the fee (not exceeding 10*l.*) to be paid in respect of each licence, and the owner of any locomotive for which a licence is required under any by-law so made who uses or permits the same to be used in contravention of any such by-law shall be liable to a fine not exceeding forty shillings for every day on which the same is so used."

The appellants are the county authority for London under the said section, and under the powers thereof made the following by-laws:—

1. "No locomotive shall be used on any highway within the county of London until an annual licence for the use of the

same shall have been obtained from the council by the owner thereof."

4. "The licence for a locomotive known as a steam-roller shall be 5*l.* a year."

The respondent was an engineer carrying on business at Crickenhill, in the county of Kent. On November 3, 1896, the steam-roller in question, which was his property, was being driven by his directions along High Street, Eltham, in the county of London, not for the purpose of rolling the highway, but for that of passing along the highway in the course of a journey from Crickenhill to Ealing, in the county of Middlesex, where it was to be temporarily employed in road-making. The respondent had not obtained from the appellants any licence to use the roller within the county of London.

The magistrate held that the mere passage of the steam-roller over the highways within the appellants' county was not such a user of the highway as was contemplated by the by-law. He accordingly dismissed the information, subject to a case for the decision of the Court.

Daldy, for the appellants. The transporting of a steam-roller or other locomotive from one place to another by its own motive power is a use of the roller or locomotive within the meaning of the by-law. This seems clear from the fact that by by-law 3, which applies to locomotives other than rollers, it is provided that "if at the time of the application for the licence such owner notifies to the council or its clerk that he does not desire to use the locomotive within the county of London on more than six days during the continuance of the licence, and that the locomotive has within three months prior to such application been licensed for use in another county, and shall produce to the clerk of the council the licence so granted, such owner shall, in substitution for the fee of 10*l.* hereinbefore specified, pay to the council a fee of 30*s.*; and a licence for which 30*s.* is paid is hereinafter referred to as a travelling licence."

Secondly, the by-law was intra vires. The passage of the roller was a use of it within s. 32 of the Highways and Locomotives Act, 1878. The intention of the Act was to tax steam-

1897

LONDON COUNTY COUNCIL v. WOOD.

rollers or traction-engines, not as such, but as locomotives. The Legislature was dealing only with locomotives; and a steam-roller is as much a locomotive when travelling as at any other time. The object was to provide against damage to roads and bridges from excessive weight.

No counsel appeared to argue for the respondent.

COLLINS J. We have, unfortunately, not had the advantage of hearing an argument in support of the magistrate's decision. But, in the absence of such argument, I think that the matter is reasonably clear. The Highways and Locomotives Act, 1878, says that a county authority may make by-laws for granting annual licences to locomotives "used" within their county. And by the powers given by that section the appellants made certain by-laws, which provide that no locomotive should be "used" on any highway within the county of London without a licence. In the present case a steam-roller, for which no licence had been obtained, was proceeding along a highway in the county of London for the purpose of enabling its owner to fulfil a contract for the employment of his roller in an adjoining county. It was not then being used to mend the roads, but was simply travelling along them in order to get to its destination. I think that the by-laws in question clearly contemplate such a passage of a locomotive along the roads as a user of the locomotive. In the case of locomotives other than steam-rollers, they provide for a mitigation of the charge for a licence where the locomotive is only travelling; but steam-rollers, not coming within that provision, must pay the full charge for a licence. I also think it was the intention of the Act under which the by-laws were made to include the passage of a locomotive within the term "user." The object of the Act was evidently to protect the highways, and the effect of a steam-roller upon the highways may be just the same whether it be engaged in mending the roads or not. If I borrow a horse to draw a load from a place ten miles off, and in order to get to that place I ride the horse there, I clearly use the horse in so doing. I use it for a purpose ancillary to the principal purpose for which it was intended to be used. The appeal must be allowed.

1897

LONDON COUNTY COUNCIL v. WOOD.

RIDLEY J. I am of the same opinion. I will content myself with adding one other illustration. A railway engine while travelling from the shed to the train is surely being used as an engine before it is attached to the train which it is intended to draw.

Appeal allowed.

Solicitor for appellants: *Blaxland.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1897

July 29.

CARLTON STEAMSHIP COMPANY *v.* CASTLE MAIL PACKETS COMPANY.

Ship—Charterparty—Ship to Load "always Afloat, as and where ordered by Charterers"—Insufficient Depth of Water in Dock—Detention of Ship.

By a charterparty dated February 22, 1897, it was agreed between the plaintiffs, the shipowners, and the defendants, the charterers, that the plaintiffs' ship should proceed to the Senhouse Dock, Maryport, or so near thereunto as she might safely get, and there load in the customary manner, always afloat, as and where ordered by the charterers, a cargo of rails. The depth of water in the Senhouse Dock varied with the state of the tides, and was sufficient at spring tides, but was not sufficient at neap tides, for a ship of the size of the chartered vessel to load there always afloat, of which fact the plaintiffs were aware. The ship having got into the dock on February 28, the defendants on March 1 ordered her to a berth, to which she proceeded and loaded a portion of her cargo, but, owing to the spring tides coming to an end, the water in the dock began to fall, so that on March 7 it was obvious that the plaintiffs' ship would soon take the ground if she continued in the dock. She therefore left the dock, and was obliged to wait until the next spring tides. She re-entered the dock on March 16, and completed her loading:—

Held, by Lord Esher M.R. and Rigby L.J., A. L. Smith L.J. dissenting, that the order given by the defendants was such as they were entitled to give under the terms of the charterparty, and that they were not liable for the detention of the ship.

APPEAL from the judgment of Mathew J. at the trial before him without a jury.

The action was by shipowners against charterers for damages for breach of the terms of a charterparty as after-mentioned.

By a charterparty made February 22, 1897, between the

C. A. 1897

CARLTON STEAMSHIP COMPANY v. CASTLE MAIL PACKETS COMPANY.

plaintiffs and the defendants, it was provided that the plaintiffs' steamship *Carlton* should with all convenient speed proceed to the Senhouse Dock, Maryport, or so near thereunto as she might safely get, and there load in the customary manner, always afloat, as and where ordered by the charterers, a full and complete cargo of rails and/or accessories, say about 2850 tons and not more than 3000 tons, and therewith proceed to Delagoa Bay or so near thereunto as she might safely get, and deliver the same, always afloat, in any dock or alongside any wharf or into craft as and where ordered by the consignees; the cargo to be discharged according to the custom of the port, with all dispatch for steamers, but not less than 200 tons per working day. Demurrage, if any, was to be paid for at the rate of 30*l.* for each working day. There was a clause in the charter-party which provided that the ship was to be at the charterers' disposal at Maryport not later than March 5, failing which the charterers were to have the option of cancelling the charter. The depth of the water in the Senhouse Dock varied with the state of the tides, and was sufficient at spring tides but not sufficient at neap tides for a vessel of the size of the plaintiffs' ship to load always afloat. Upon the evidence the Court of Appeal came to the conclusion that the plaintiffs were aware of the character of the dock in this respect. The vessel arrived off the Senhouse Dock on February 27, and went into the dock on the 28th. An order was given by the charterers on March 1 that the ship should proceed to the middle berth, Senhouse Dock, where her cargo was awaiting her. The ship proceeded to that berth and took in between 500 and 600 tons of cargo. The spring tides, however, coming to an end while the ship was loading, the water in the dock began to fall, so that on March 7 it became obvious that the ship would soon take the ground. The plaintiffs thereupon took the ship out of the dock, and sent her to Barrow, the nearest port, claiming that the rest of the cargo should be delivered to her there. The defendants refused to supply cargo there. It was subsequently arranged that, without prejudice to the rights of the parties, the ship should come back to the Senhouse Dock when the tides began to make again, and finish loading there, so as

to get away by the next spring tides. She accordingly came back on March 16, got into the dock and, after completing her loading there, ultimately sailed for her destination. The plaintiffs claimed damages for breach of contract in not ordering the plaintiffs' ship to a berth in accordance with the terms of the charterparty, whereby the ship was detained, and in the alternative for demurrage or damages for detention.

The learned judge held that there had been a breach of the contract contained in the charterparty in not ordering the ship to a berth in accordance with its terms, and that the action was therefore maintainable, but he reserved the question of the amount of damages for further hearing.

Joseph Walton, Q.C., and *James Fox*, for the defendants. The obligation of the charterers to load the ship does not arise under this charterparty directly the ship gets into the dock. She is to be loaded always afloat as and where ordered by the charterers. Under the circumstances the charterparty cannot be construed as meaning that the charterers must necessarily give an order for a berth where the ship can be loaded always afloat without any delay. It must mean that an order shall be given for a berth where she can load always afloat and get away within a reasonable time. The order given by the charterers was for a berth where the ship could have been loaded, always afloat, at the next spring tides. The sole question is whether that was a proper order within the terms of the charterparty or a bad order on the ground that the delay involved was unreasonable. The plaintiffs knew or must be taken to have known the circumstances and character of the port to which the charterparty referred, and delay which arose from the state of the tides at that port cannot be considered unreasonable. The order for a berth was given without delay, and the delay arose, not from any default of the charterers, but from the natural and well-known condition of things with regard to the state of the tides at the Senhouse Dock, of which the shipowners must be considered to have undertaken the risk. Therefore it was not a delay which made the order given by the charterers an improper one or a breach of the charterparty.

C. A. 1897

CARLTON STEAMSHIP COMPANY v. CASTLE MAIL PACKETS COMPANY.

The order given was the only order which the charterers could give. The obstacle to the ship's loading at the berth indicated was only temporary and not permanent, and the ship was therefore bound to wait till the state of the tides permitted her to load there in accordance with the charterparty.

[They cited *Schilizzi* v. *Derry* (1); *Parker* v. *Winlow* (2); *Dahl* v. *Nelson, Donkin & Co.* (3); *Metcalfe* v. *Britannia Iron Works Co.* (4)]

Robson, Q.C., and *Scrutton*, for the plaintiffs. The time for loading under this charterparty commenced as soon as the ship arrived at the Senhouse Dock. She was then an "arrived ship": *Tapscott* v. *Balfour.* (5) This case is distinguishable from *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (6) In that case the charterparty was construed as meaning that the ship should proceed to a berth to be named by the charterers; but here she was to proceed to the Senhouse Dock, and she was to be at the charterers' disposal at Maryport. When she arrived at the Senhouse Dock there was no place there at which she could load always afloat within a reasonable time from her arrival; therefore the shipowners were entitled to send her to Barrow, that being the nearest port at which she could load safely: *Shield* v. *Wilkins* (7); *General Steam Navigation Co.* v. *Slipper.* (8) The shipowners were not under the circumstances bound to let the ship go to the berth named, and they must be taken to have done so for the purpose of mitigating the damages: *Reynolds & Co.* v. *Tomlinson.* (9) The order for a berth given by the charterers was not a proper order within the terms of the charterparty, for the ship could not load always afloat at that berth until the next spring tides, which involved about a fortnight's delay. Such a delay is unreasonable in the case of a large steamer such as this, on which the demurrage was to be 30*l.* a day. The order given was either an order to go immediately to a berth

(1) (1855) 4 E. & B. 873.
(2) (1857) 7 E. & B. 942.
(3) (1881) 6 App. Cas. 38.
(4) (1877) 2 Q. B. D. 423.
(5) (1872) L. R. 8 C. P. 46.
(6) [1891] 2 Q. B. 647.
(7) (1850) 5 Ex. 304.
(8) (1862) 11 C. B. (N.S). 493.
(9) [1896] 1 Q. B. 586.

where the ship could not load always afloat, or it was an order to go there after an unreasonable delay. In either case it was a bad order.

[They also cited *The Alhambra*. (1)]

Joseph Walton, Q.C., in reply.

LORD ESHER M.R. This is no doubt a difficult case. The learned judge in the Court below appears to have held that the order for a berth given by the charterers was not a proper order under the terms of the charterparty, but I cannot agree with him in that view. This was an English charterparty made between English shipowners and charterers with respect to an English port, namely, Maryport. That port, like many others, has a dock in which the depth of the water varies with the state of the tides, there being a certain depth of water at neap tides and between neap and spring tides, and another depth during spring tides. Information with regard to the ordinary depth of the water at different states of the tides in the different English ports is published in many publications which are in the hands of shipowners and charterers. It appears to me that a shipowner is bound to know the ordinary natural conditions of a port to which he undertakes that his ship shall go; and both parties, when they entered into this charterparty, must I think be taken to have known the ordinary conditions of the port to which it related with regard to the depth of the water in the dock at the different states of the tides. That being so, the charterparty provides that the ship shall proceed with all convenient speed to the Senhouse Dock, Maryport, or so near thereunto as she may safely get. The convenient speed depends not only on the engine-power of the ship, but also on the weather that may be encountered on her way to the port. If the ship encountered head-winds or storms, she would not arrive so soon as she otherwise would. So both parties must have known that it was to some extent uncertain at what state of the tides the ship would arrive. As I have said, the vessel was to proceed to the Senhouse Dock, or, if she could not safely get into the dock, she was to get as near thereto as she

(1) (1881) 6 P. D. 68.

C. A. 1897

CARLTON STEAMSHIP COMPANY v. CASTLE MAIL PACKETS COMPANY.

Lord Esher M.R.

safely could. There was no difficulty in the ship's getting safely into the Senhouse Dock; but I will assume the meaning of the charterparty to be that the ship was only bound to go to a place into which she could safely get and from which she could safely come out when loaded. Therefore it had also to be considered whether she could safely load in the Senhouse Dock and get out again when loaded. At particular states of the tides it was clear that there would not be water enough to float her when loaded, but at other states of the tides there would. Therefore it seems to me that she was bound under the circumstances to go into the Senhouse Dock, and there was nothing to prevent her from doing so. She did go into the dock. But, when she got into the dock, where was she to go to be loaded according to the charterparty? She was in this case not to be loaded directly she got in, but in such part of the dock as might be ordered by the charterers. Therefore, the shipowners undertook to put their ship, not into the dock only, but at such part of the dock as might be ordered by the charterers. That is a power given to the charterers for business reasons. It might be important for them that the ship should be brought to a particular part of the dock where they would have cargo awaiting her. They therefore reserve to themselves the right of ordering the ship to a particular berth in the dock to be named by them. On the other hand, the berth selected by the charterers might be one which would be an awkward or dangerous berth for the ship, and therefore the shipowners stipulate that the berth to which the ship is ordered to go shall be such that, while loading, the ship shall always be afloat. Such being the provisions of the charterparty, what is the obligation of each party under it? The obligation of the shipowners is that the ship shall go into the dock and notice shall be given of her arrival in the dock to the charterers. Upon that notice being given the charterers are entitled and bound to give, and the shipowners are entitled to receive, an order as to the berth where the ship is to load, which must be one at which the ship can load always afloat. The charterers could not wait for a month before giving such an order, but would be bound to give the order, I think, almost immediately.

Here an order was given on March 1, and it is not denied that that order was given in due time. Then, is there any term either expressly contained in the charterparty, or arising by necessary implication as a matter of business between the parties, to the effect that the order must necessarily be for a berth to which the ship can go immediately? It does not appear to me that there is. I do not think the order need be for a berth to which the ship can proceed instantly, or even for one which is vacant at the moment. I think the order to be given must be for a berth to which the ship can go within a reasonable time, and there load always afloat. That was the order which one party was entitled to give and the other was bound to obey. It has been suggested that the order which was in this case given meant that the ship was to go immediately into the berth indicated and begin loading. I do not think that is a reasonable construction of it. I think that, reasonably construed, it meant that the ship was to go into the berth as soon as she could properly do so. The berth was by the terms of the charterparty to be one where the ship could load always afloat. At the time when the order was given the condition that the ship should be always afloat when loading could not be fulfilled owing to the insufficient depth of water, but it would be fulfilled at the next spring tides. I think that the reasonable view of the order is that it was an order to go to the berth as soon as the ship could load there in accordance with the terms of the charterparty, i.e., at the next spring tides. Then, was the order so construed an unreasonable one, or was it for such a berth as under the circumstances the parties must be taken to have contemplated when they entered into the charterparty? The order was no doubt to go to a berth to which the ship could not go and load in accordance with the terms of the charterparty without some delay, but that was because the natural circumstances of the port and the ordinary condition of things there with regard to the state of the tides, which the parties must be taken to have contemplated, were such that the ship could not load there always afloat, and get away until the next spring tides. I do not see how it can be said to be unreasonable to give the only order that could be

C. A. 1897

CARLTON STEAMSHIP COMPANY v. CASTLE MAIL PACKETS COMPANY.

Lord Esher M.R.

obeyed so as to satisfy all the terms of the charter. I feel great hesitation in differing from the learned judge below, and from A. L. Smith L.J., who, I understand, is of the contrary opinion; but it seems to me that this was an order which the charterers were entitled to give under the terms of the charterparty, and which was reasonable within those terms. Therefore the action for breach of contract by the defendants in not giving a proper order fails. It was suggested that, although they gave a right order, they might nevertheless be liable to pay demurrage. That contention seems to me quite unreasonable. For these reasons I think the appeal should be allowed.

A. L. SMITH L.J. I need hardly say that it is with great diffidence that I differ from the Master of the Rolls and my brother Rigby; but I cannot come to the conclusion that the learned judge in the Court below was wrong in this case.

The case turns mainly on the construction of the charterparty. The question is what obligation the charterers undertook when the ship became an "arrived" ship in the dock mentioned in the charterparty. The charterparty has relation to a large steamship which the charterers were desirous of loading with a cargo of rails in the Senhouse Dock, Maryport. I do not feel certain that every shipowner ought to be taken to know the character of the port of loading; but I express no opinion on that point, for I will take it that on the facts of this case it appears that both parties knew the natural circumstances and character of the port of Maryport. Before proceeding to deal with the terms of this charterparty, I wish to make this observation. A great number of cases have been decided in which the question was whether a ship had become an "arrived" ship within the meaning of a charterparty, so that the liability of the charterers to load or unload, as the case might be, had attached. A good example of this class of case is *Dahl* v. *Nelson, Donkin & Co.* (1), in which the controversy on this question may be considered as summed up.

But, in my judgment, none of those cases really bears upon the present point, because under the terms of this charterparty

(1) 6 App. Cas. 38.

the ship was clearly an "arrived" ship when she got into the Senhouse Dock. What was the obligation that then arose on the part of the charterers, the shipowners having performed their part of the charterparty by having brought the ship to the place named in the charterparty ready to be loaded? It seems to me that on the true construction of the charterparty the obligation of the charterers was to give, not necessarily immediately or on the next day, but within a reasonable time, an order for a berth at which the ship could lie always afloat and load within a reasonable time. With all submission to the opinion of the Master of the Rolls and my brother Rigby, I cannot think that any question as to the course of nature and the circumstances of the port has a bearing upon the question as to what the contract was. In my opinion, according to the contract, when the shipowners had brought their ship to the spot named in the charterparty and were ready to take in cargo, the charterers were under an obligation to give an order for a berth where she could lie always afloat and load within a reasonable time. Then was such an order given here? The order given was, in substance, such that, if the ship obeyed it, she could not have taken in her cargo always afloat till after about a fortnight from the date of the order. The learned judge below held that that was not a proper order to give with regard to a steamer of such a size as this, the agreed demurrage in respect of which was to be at the rate of no less than 30*l.* a day. There must be some limit with regard to the time for which the ship can be kept waiting, and in my judgment a fortnight in such a case as this is an unreasonable time. I think it unreasonable to impose this loss on the shipowner, who has performed his obligation in bringing the ship to the place mentioned in the charterparty. For these reasons, I agree with the judgment of the learned judge in the Court below, and think the appeal should be dismissed.

RIGBY L.J. In this case I am of opinion that the appeal should be allowed. The first question is, what are the contingencies that may reasonably be taken to have been in the minds of the contracting parties when they entered into

C. A.
1897

CARLTON STEAMSHIP COMPANY *v.* CASTLE MAIL PACKETS COMPANY.

Rigby L.J.

the charterparty? If it were necessary, I should be prepared to agree with the view taken by the Master of the Rolls, that, where a firm in Newcastle is dealing with a ship that is to proceed to Maryport, they must be taken to know what is the ordinary condition of things as to the depth of water at the port. But, like my brother A. L. Smith, I think this case may be dealt with in relation to the actual knowledge of the parties. It seems clear to me from the correspondence that they entered into the charterparty with full knowledge of the state of things with regard to the depth of water in the Senhouse Dock at different states of the tides, and the risk that existed of the vessel being neaped. The vessel arrived in the dock on February 28, and on March 1, and therefore promptly enough, an order was given her for a berth. It seems to be admitted that the order must be one indicating a berth which would be available within a reasonable time. I do not think that a delay which arose from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charterparty can be considered unreasonable. It appears to me that upon the authorities, particularly *Tharsis Sulphur Co.* v. *Morel* (1), it was not the charterers' duty to indicate a berth to which the ship could go immediately for the purpose of loading, but only one to which she could go for that purpose within a reasonable time.

Appeal allowed.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

Solicitors for defendants: *Parker, Garrett & Holman.*

(1) [1891] 2 Q. B. 647.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1897
July 2, 30.

In re FORT.
Ex parte SCHOFIELD.

Partnership—Loan in consideration of Share of Profits—Contract not in Writing—Postponement to other Creditors in Bankruptcy—Partnership Act, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 2 *sub-s.* 3 (*d*), *s.* 3.

The rights of a person who advances money by way of loan to another engaged in business, on a contract that the lender shall share in the profits of the business, are postponed under s. 3 of the Partnership Act, 1890, in case the person to whom the money has been advanced is adjudged a bankrupt, until the claims of the other creditors have been satisfied, whether the contract to advance the money be oral or in writing.

Appeal from the Manchester County Court.

In April, 1894, T. B. Schofield advanced to the debtor, J. W. Fort, a sum of 3000*l.* upon a promissory note to enable the debtor to set up business as a jeweller at Manchester. It was agreed between them that, in consideration of such advance, the debtor should pay to Schofield by way of interest 5 per cent. and a half share of the net profits of the business. That agreement was not in writing. In April, 1896, Schofield pressed for repayment of the money, and on August 15 he commenced an action on the promissory note for the recovery of the 3000*l.* and interest. As a defence to that action the debtor pleaded that they were partners. At the trial the jury found that they were not partners, and judgment was entered for the plaintiff. In April, 1897, a receiving order was made against the debtor. At a meeting of creditors held on April 23 Schofield tendered a proof for the amount of his judgment debt, which proof was objected to, but admitted by the official receiver for the purpose of voting. At that meeting a resolution was passed by a majority in value of the creditors present, including Schofield, that G. H. Lawton be appointed trustee. An alternative resolution was passed appointing one Heathcote trustee, if Schofield's proof ought not to be admitted.

On May 12 a motion was made on behalf of Heathcote in the Manchester County Court for a declaration that Schofield's

C. A. 1897

FORT, *In re.* SCHOFIELD, *Ex parte.*

proof was invalid, and that the financial relationship between Schofield and the debtor had been such as to disentitle Schofield to receive anything in respect of his loan until the claims of the other creditors of the debtor had been satisfied. The judge rejected the proof except as to a sum of 135*l.* 10*s.*, and declared that the resolution appointing Heathcote trustee was to be deemed to have been carried.

Schofield appealed to the Divisional Court.

July 2. *H. Reed, Q.C.*, and *Bradbury*, for the appellant. The county court judge was wrong in holding that the claim of the appellant in respect of his loan was liable to be postponed to the claims of the other creditors under s. 3 of the Partnership Act, 1890. (1) That section only applies where the money has been advanced "upon such a contract as is mentioned in the last foregoing section"; and s. 2, sub-s. 3 (*d*), by the express terms of the proviso thereto, has no application unless the contract is in writing. Here the contract was oral. The intention of the Act was that the lender should only be postponed under s. 3 where he requires the protection of s. 2. The liability goes with the benefit. The language of s. 1 of Bovill's Act (28 & 29 Vict. c. 86), for which s. 2, sub-s. 3 (*d*), of the present Act is substituted, was no doubt stronger, for it

(1) By s. 2, sub-s. 3, of the Partnership Act, 1890, "The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:

"(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing and signed by or on behalf of all the parties thereto."

By s. 3, "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . . being adjudged a bankrupt . . . . the lender of the loan shall not be entitled to recover anything in respect of his loan . . . . until the claims of the other creditors of the borrower . . . . for valuable consideration in money or money's worth have been satisfied."

was expressly limited to the case of a loan "upon a contract in writing"; and it was clear that the lender was not postponed to the other creditors under that Act where the loan was under an oral contract. But it was not intended in the present Act to alter the law in that respect. The proviso in clause (*d*) is to be read as an adjective inserted in and qualifying the description of the contract.

[They referred to *Ex parte Mills, In re Tew* (1); *Badeley* v. *Consolidated Bank* (2); *Cox* v. *Hickman.* (3)]

E. Sutton, for the respondent Heathcote. The words in s. 3, "upon such a contract as is mentioned in the last foregoing section," refer to a contract of loan in consideration of a share of profits irrespective of the question whether such contract is in writing or not. The form of the contract is no part of its description. Lindley L.J., in the supplement to the 5th edition of Lindley on Partnership, p. 4, when dealing with this question observes that "good sense will probably lead the Courts to construe s. 3 so as to avoid the absurdity of putting a lender of money without, in a better position than one with, a written contract for a share of profits."

Reed, Q.C., in reply.

VAUGHAN WILLIAMS J. This is an appeal against an order of the county court whereby the appellant's right of proof against the debtor's estate was postponed to those of the other creditors on the ground that his claim was in respect of a loan of the kind dealt with by s. 3 of the Partnership Act, 1890. The question which we have to decide is whether the case falls within that section.

The contract upon which the loan was advanced provided that the lender should be entitled to a share of the profits of the borrower's business by way of interest upon the loan, but that contract was not in writing. The ground of the appeal is that s. 2, sub-s. 3 (*d*), applies only to a case where the loan is under a contract in writing signed by the parties, and that the postponement provided for by s. 3 is only intended to operate

(1) (1873) L. R. 8 Ch. 569. (2) (1888) 38 Ch. D. 238.
(3) (1860) 8 H. L. C. 268.

C. A. 1897

FORT, *In re.* SCHOFIELD, *Ex parte.*

Vaughan Williams J.

in cases falling within s. 2, sub-s. 3 (*d*). In my judgment the appellant's contention is right. It is plain that clause (*d*) gives to persons who lend money under a written agreement signed by the parties thereto a certain benefit, and it is obvious that s. 3 intended to impose a burden as a condition of the benefit so conferred by clause (*d*). I think it was not intended that that burden should be imposed in any case in which the statute did not confer the benefit. It would be enough for me to leave the matter there, for the construction of the Act seems reasonably free from ambiguity; but I think also that the history of the law on this subject points to the conclusion that the construction which I have put on the section is the right one. Previously to the decision in *Cox* v. *Hickman* (1) the proposition laid down in *Waugh* v. *Carver* (2), that receipt of a share of the general profits of a business of itself constituted a partnership, was generally regarded as a correct proposition of law. Then in *Cox* v. *Hickman* (1) the House of Lords overruled that doctrine, and established that receipt of profits was only primâ facie evidence of a partnership. A few years later Bovill's Act (28 & 29 Vict. c. 86) was passed, which Act, notwithstanding criticisms passed upon it in *Pooley* v. *Driver* (3) and other cases, I believe to have been an Act framed upon the basis of the law being as it was declared to be in *Cox* v. *Hickman*. (1) The cases in which that Act was criticised seem to lay down that although the receipt of profits may be evidence of the existence of a partnership, it is so only to the extent to which it shews that the parties intended that relationship. As soon as these doubts were cast upon the basis of the law on which Bovill's Act was founded, the Act became difficult of application. In that state of things the Partnership Act, 1890, was passed, and s. 2, sub-s. 3, of that Act seems to give a statutory effect to the basis of law upon which Bovill's Act purported to be founded, and makes it clear that if there is a receipt of a share of the profits and nothing more, there is a partnership. It may be that the surrounding facts are sufficient to rebut the presumption of partnership, but primâ

(1) 8 H. L. C. 268. (2) (1793) 2 H. Bl. 235.
(3) (1876) 5 Ch. D. 458.

facie the recipient of the profits is a partner. That being so, I think that the construction which I have put upon s. 3 of the Act of 1890 will work no commercial injustice, for a person who lends money upon an oral agreement for a share of the profits runs this risk—that mere receipt of the profits under such an agreement will primâ facie make him a partner. I think that any Court which had to deal in such a case with the question of partnership or no partnership would hold that the onus of proof which the receipt of profits casts upon the recipient was an onus not easily to be satisfied; because when a Court finds that an important mercantile transaction is without sufficient explanation arranged by word of mouth instead of being committed to writing, it will regard it with all the jealousy with which Courts regard transactions which are not in accordance with business principles and business forms, and will make every intendment against it. This appeal must be allowed.

WRIGHT J. I am of the same opinion. I think it is reasonable to hold that the burden of being postponed to the other creditors was intended to be imposed only on those to whom the benefit was given. The exact result so intended is not indeed accomplished, because the burden is in fact imposed upon some persons who get no benefit under the statute, namely, on persons who, notwithstanding they may have entered into a certain contract of the kind mentioned in s. 2, sub-s. 3, would not have been partners at common law. But the Act does not distinguish between those classes, and s. 3 has imposed upon the latter class the same burden which it has imposed upon those who want the benefit of the statute. But the fact that the statute has unnecessarily imposed the burden in certain cases is no reason why we should extend that unfairness to others; and it seems to me that where there is no written contract, if the lender can prove that, although he lent the money in consideration of a share of the profits, he was not in fact a partner, as he has succeeded in doing in the present case, so that he does not want the protection of the Act at all, there is no reason why his rights should be taken away in the absence

C. A. 1897

FORT, *In re.* SCHOFIELD, *Ex parte.*

of a clear indication of an intention on the part of the Legislature to do so.

J. F. C.

Heathcote appealed.

July 30. *J. Eldon Bankes*, in support of the appeal. The contract referred to in s. 3 is a contract to share profits. The objects of s. 2 and s. 3 are not identical, and the limitation in the proviso to sub-s. 3 (*d*) of the former section does not apply to the latter. If it did, the position of a lender on an oral contract would be better on the bankruptcy of the borrower than that of a lender on a written contract. [He cited *Ex parte Taylor, In re Grason.* (1)]

H. Reed, Q.C., and *Bradbury*, for Schofield. The Act is disenabling, because apart from the statute a lender may prove in the bankruptcy of the borrower with other creditors unless he is a partner. The only contract dealt with in s. 2, sub-s. 3 (*d*), is a contract in writing, and that is the contract mentioned in s. 3. The disability imposed by s. 3 was intended to apply only where a benefit is conferred by s. 2.

LORD ESHER M.R. I am of opinion that this appeal should be allowed. If this had been a loan and nothing else the Act would not touch the matter; but the money was lent upon the terms that until repayment Schofield was to be paid interest, and further, after the payment of a salary to the bankrupt as if he were manager of the business, Schofield was to receive a share of the net profits. Such a contract comes within the words of s. 2 of the Act, describing the contract dealt with in the section. The proviso is no part of such description. Sect. 3 refers to such a contract as is mentioned in s. 2, and provides that, in the case of such a contract, if the person to whom the money is advanced is adjudged a bankrupt, the rights of the lender are to be postponed to the claims of other creditors. This case, therefore, comes within s. 3. It is not necessary in this view of the case to determine whether Schofield was or was not a partner. Assuming that he was not, he had advanced

(1) (1879) 12 Ch. D. 366.

money by way of loan to a person about to engage in business on a contract with that person to share the profits. He therefore comes within the disability of s. 3, and *Ex parte Taylor, In re Grason* (1), shews that a person under such a disability is not entitled to prove for any purpose whatever. He therefore could not vote in respect of his debt, and the county court judge was right in declaring that Heathcote had been properly elected trustee. The appeal will therefore be allowed.

A. L. SMITH L.J. I am of the same opinion. The question turns upon the construction of s. 3 of the Partnership Act, 1890, taken in conjunction with s. 2, sub-s. 3 (*d*). It is clear that under s. 3 in certain cases persons who lend money to borrowers to be employed in trade on a contract to share in the profits of the trade are postponed in the bankruptcy of the borrower to other creditors. It is difficult to see why this should be the case where the contract is in writing, and not where it is by parol. It was suggested that it was a case of a benefit and a burden running together; but I cannot see the force of that argument—indeed, my brother Wright in his judgment points out that this result is not fully accomplished. It seems to me that the contract referred to in s. 2, sub-s. 3 (*d*), is a contract either oral or in writing, but that if the benefit of the section is desired by the lender then, under the proviso, the contract must be in writing. If that is the meaning of s. 2, sub-s. 3 (*d*), then the contract referred to in s. 3 is of the same kind, and whether it is oral or in writing, the rights of the lender under it are postponed on the bankruptcy of the borrower to the claims of his other creditors for valuable consideration in money or money's worth. For these reasons I think the appeal should be allowed.

RIGBY L.J. I am of the same opinion. It seems to me on the simplest construction of s. 2 that there is a description of a contract by which the lender is to share in the profits of the business carried on by the borrower, and that the contract described is not confined to one in writing. Then under the

(1) 12 Ch. D. 366.

C. A. 1897

FORT, *In re.* SCHOFIELD, *Ex parte.*

Rigby L.J.

proviso such a contract is to have a certain effect if it is in writing. Sect. 3 in effect says that the contract described in the previous section shall have a further result. If we had to deal with the sections only, I should consider the matter simple; and it is certainly not made more difficult by reference to Bovill's Act, which was repealed by this statute. The operation of the former Act was restricted to a contract in writing, and the language has been changed in the Act now before us. I think that the case has been brought within s. 3, and that the rights of the lender are postponed by that section to the claims of the other creditors.

Appeal allowed.

Solicitors for creditor: *Robbins, Billing & Co., for J. H. Lea, Manchester.*

Solicitors for trustee: *Bower, Cotton & Bower, for J. H. Boardman, Manchester.*

A. M.

1897 *July* 27, 28; *Aug.* 10.

IN THE MATTER OF A CLAIM BY THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF NOTTINGHAM.

Revenue—Forfeited Recognizance—Amercement — Construction of Charter to Corporation.

By a charter of Henry IV. the Crown granted to the corporation of Nottingham "all fines for trespasses and other offences whatsoever, and also fines for licence to agree, and all amercements, ransoms and forfeited issues, forfeitures year day waste and estrepement."

By a charter of Henry VI. the Crown granted to the corporation "all issues fines and amercements from whatsoever pledges and mainpernors" of persons dwelling in the borough:—

Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of felony or misdemeanour pass to the corporation.

SPECIAL CASE stated for the opinion of the Court, from which the following facts appeared.

A charter made by Henry IV. in the year 1399 granted to the mayor, bailiffs, and burgesses of the town of Nottingham,

their heirs and successors (inter alia), "all fines for trespasses and other offences whatsoever and also fines for licence to agree and all amercements ransoms and forfeited issues forfeitures year day waste and estrepement and all things that might pertain to us or our heirs of such year day and waste and of murders of all men and tenants of the town aforesaid in whatsoever courts of us and our heirs it shall happen that the said men and tenants be adjudged to make fines or be amerced or to forfeit issues year day and waste or forfeiture and murders."

A charter made by Henry VI. in the year 1448 granted to the corporation (inter alia) "all amercements ransoms and issues forfeited and to be forfeited and all fines for trespasses and other offences negligences misprisions and contempts whatsoever and also fines for licence to agree and all things that may in any wise pertain to us and our heirs from the men or any tenants or inhabitants of that town and also all issues fines and amercements from whatsoever pledges and mainpernors of any person dwelling within the same town of Nottingham or being there wholly or not wholly a tenant although that person or those pledges or mainpernors have holden of us our heirs or successors or of others and also from all and singular the burgesses of the same town both resident and not resident although they have not been wholly tenants there or have holden there or elsewhere of us our heirs and successors or of others in whatsoever the courts of us our heirs or successors."

On November 17, 1881, John Holbrook, who was charged before justices of the borough of Nottingham with embezzlement, was committed for trial at the next assizes, but was admitted to bail upon entering with two sureties into a recognizance to surrender and take his trial; and on December 20, 1881, Henry Hooley, charged with bigamy, and on January 5, 1882, Edward Foster, charged with misdemeanour under the Debtors Act, 1869, were respectively committed for trial at the next assizes, but were admitted to bail upon severally entering with two sureties into recognizances with a like condition. At the assizes they at first failed to surrender when called upon, but subsequently surrendered, and each of them and each of

1897

NOTTINGHAM CORPORATION, *In re.*

their sureties was severally fined the sum of 2*l*. The said fines having been duly estreated, the amount thereof was received by the sheriff from the respective parties, who were all resident in the borough of Nottingham, and the net amount after deduction of fees and charges was paid over by the sheriff to the Lords Commissioners of the Treasury. The amount so handed over was now being claimed by the corporation under 3 & 4 Will. 4, c. 99, ss. 35, 36. It was understood at the time the same was paid over by the sheriff that the corporation should raise the claim then made to these fines under the procedure provided by that Act, and that the validity of such claim should be determined thereunder.

On June 1, 1882, William Graham, who was charged before justices of the borough with conspiracy to obtain money by false pretences, was committed for trial at the next assizes, but was admitted to bail, himself in a recognizance of 100*l*. and one surety, Thomas Miller, in 100*l*. He failed to surrender at the assizes, and the recognizances of himself and his surety were forfeited and were duly estreated; the sum of 26*l*. 15*s*. (after deduction of expenses) was levied upon the goods of William Graham, and the sum of 91*l*. 4*s*. (after a similar deduction) was received from Thomas Miller, and both were subsequently paid over by the sheriff to the Lords Commissioners of the Treasury in the same manner and on the same understanding as the sum previously mentioned. At all material times William Graham was resident in the borough of Nottingham; but Thomas Miller never was resident in the borough, nor had he any tenement within it, nor was he a burgess of the borough.

The petitioners memorialised the Lords Commissioners of the Treasury to order payment to their treasurer of the said amount, but the commissioners declined to do so. The petitioners thereupon, in accordance with 3 & 4 Will. 4, c. 99, s. 36, applied by petition to the High Court of Justice praying that it might be declared that they were entitled to the said sums, and that the Lords Commissioners of the Treasury might be ordered to pay the same to them with costs. An order was made that the petition be served upon the Lords Commissioners of the Treasury, and that the parties attend before the judge in

chambers; upon the petition coming on for hearing in chambers an order was made by consent that a special case be stated for the opinion of the Court, which was accordingly done.

The question for the opinion of the Court was whether the corporation were entitled to the sums above mentioned, or to any of them.

Sir R. T. Reid, Q.C. (*Asquith, Q.C.*, and *C. F. Pritchard* with him), for the corporation of Nottingham. The main question is whether, when a person resident in Nottingham, who has been committed for trial on a criminal charge and admitted to bail, fails to surrender to take his trial, the estreated recognizances of himself and his sureties go to the Crown or to the corporation under the terms of their charters. It is contended that the words "issues fines and amercements from whatsoever pledges and mainpernors of any person dwelling within the town of Nottingham" are wide enough to include estreated recognizances. The terms "pledge" and "mainpernor" mean the same thing, namely, the surety which a prisoner is to find for his due appearance: Dalton's Office of Sheriff, c. 96, tit. Bailment, p. 356. It is there stated that though a distinction was drawn in the forest law between pledge or bail and mainprise, the two terms were used indifferently in the common law. The term "amercement" as applied to a surety meant the forfeiture of his recognizance. This appears from the language of the Statute of Marlbridge, 52 Hen. 3, c. 27, which provided that if a clerk who had been arrested for a crime and bailed appeared before the justices, "non amercientur, illi de cetero quibus traditus fuerit in ballium, vel alii plegii sui," in the event of his refusing to answer by reason of his clerk's privilege. But if an estreated recognizance is not to be included under the term "amercement," it at all events comes under the term "issue." In Dalton's Office of Sheriff, c. 11, it is said: "The word 'issues' in our law is sometimes used for the profits growing to the king, &c., as an amerciament, fine, forfeiture, or punishment, assessed upon jurors, &c., for default of appearance." The case of *Rex* v. *Dover* (1) will be relied on

(1) (1835) 1 C. M. & R. 726.

1897

NOTTINGHAM CORPORATION, *In re.*

by the Crown for the contrary. It was there held that a forfeited recognizance to appear to answer a charge of misdemeanour did not pass under a charter which granted to the corporation all "fines issues . . . . amerciaments and profits whatsoever before the aforesaid justices." But there the charter did not contain the words "from whatsoever pledges and mainpernors." That case is, therefore, no authority against the present contention. [He also cited Hale's Pleas of the Crown, vol. ii. c. 15, p. 124.]

The Attorney-General (*Sir R. E. Webster, Q.C.*) (*H. Sutton*, with him), for the Crown. It is not disputed that the corporation is entitled to fines, but estreated recognizances do not come within the same category: they are not within the terms of these charters. In *Rex* v. *Dover* (1), the case was much stronger than the present in favour of the corporation, for there the charter contained the word "forfeiture"; but it was held that what is termed a forfeited recognizance is nothing but a debt due to the Crown. Originally a mainpernor did not give any bail bond; he had to appear in court, and if he failed to produce the body of the person bailed to him he was amerced. This appears from the account of mainprise given in Termes de la Ley. Amercement was originally the remedy against the mainpernor, because he did not owe a debt of record to the Crown. Recognizances as now understood were clearly in existence at the time of these charters, as appears from the Statute of Merchants, 11 Edw. 1, passed in 1283; but there is nothing in either of these charters that could by any reasonable intendment be held to include them. "Issues" have nothing to do with recognizances: the term "issue" has always been confined to something issuing out of land, as rent or growing corn, in cases where a sheriff distrained by distringas on the profits on land: see Jacob's Law Dictionary; Dalton's Office of Sheriff, c. 11.

[They also referred to Madox's History of the Exchequer, vol. i. p. 555; *Attorney-General* v. *Resby* (2); Blackstone Comm. vol. ii., p. 341; Chitty's Criminal Law, vol. i. p. 89;

(1) 1 C. M. & R. 726. (2) Hardr. 377.

vol. iv. pp. 478, 487a; 22 & 23 Car. 2, c. 22; Chitty's Prerogative of the Crown, p. 391.]

Sir R. T. Reid, Q.C., in reply.

[RIDLEY J. referred to Mirror of Justices, Selden Society's Publications for 1893, p. 128.]

Aug. 10. POLLOCK B. This case arises out of a claim made by the mayor and corporation of Nottingham to certain fines and forfeited recognizances received by the sheriff of Nottingham, which are claimed by the Crown. The petitioners, the mayor and corporation, claim by virtue of certain old charters granted by the Crown to their town; and after the petition was filed an order was made for the stating of a special case, in which all the facts will be found.

The two cases of the fines and the recognizances differ both in fact and in principle. As to the fines, there are facts set out in the case which shew that certain persons, a prisoner and his two sureties, entered into recognizances for the appearance of that prisoner at the next court of assize held for the county and town of Nottingham. Those three persons did not appear at the proper time, but ultimately they appeared and the prisoner was rendered, and the Court, taking notice of their misconduct, fined them each the sum of 2*l.* With regard to the claim in respect of these sums, the Attorney-General has admitted on behalf of the Crown that he cannot support the contention that these sums, being fines, are not within the charters, and therefore upon that part of the case judgment must be given for the corporation.

As regards the other part of the case, there are two sums, one of 26*l.* 15*s.* and the other of 91*l.* 4*s.*, the claim to which arises in this way. Again it was the case of a prisoner and his surety, who were bound over by the usual recognizances and bail bond that the prisoner should be rendered at the next assizes for the county and town of Nottingham in the above sums respectively. Those recognizances were wholly forfeited, and upon their being forfeited they became a debt of record due to the Crown of those two sums, which are now claimed by the corporation as money received and handed over by them to the

1897

NOTTINGHAM CORPORATION, *In re.*

Pollock B.

Crown; they claim the return of them, and the Attorney-General disputes their right to such return.

The claim depends upon the proper construction to be put upon two charters, the first being a charter of Henry IV., in the year 1399, to the burgesses of Nottingham, in which, after reciting as is usual the desire upon the part of the Crown to bestow upon the burgesses certain rights and privileges, it goes on to say, "the cognizance of pleas, the holding of pleas of assizes of tenures," and many other rights, amongst which are the chattels of felons; but the words which are most in favour of the corporation are these: "and that they shall have for ever all fines for trespasses and other offences whatsoever and also fines for licence to agree and all other amercements." That word "amercements" is, I think, the word most in their favour, and therefore the only one with which we have substantially to deal. The clause goes on: "and all other things that might pertain to us or our heirs of such year day and waste and of murders of all men and tenants of the town," and so forth, "in whatsoever courts of us and our heirs it shall happen that the said men and tenants be adjudged to make fines or be amerced." Now, the word "amerced" is a very old word in English law. It is to be found again and again in all courts: courts of forest, courts baron, manor courts, in local hundred courts, and others. It really is the same word as that which is used at the end of most of the entries of the proceedings of those courts when a man is said to be amerced—that is to say, that he is to be in mercy as being liable to such a punishment as may be inflicted upon him, mostly by fine, but not necessarily by fine alone.

The next charter is one of Henry VI. in 1448, in which the words are practically the same, for after granting chattels of felons it proceeds thus: "and that the same present burgesses of that town and their successors have for ever all amercements ransoms and issues forfeited and to be forfeited and all fines for trespasses and other offences negligences misprisions and contempts whatsoever and also fines for licence to agree and all things that may in any wise pertain to us and our heirs from the men or any tenants or inhabitants of that town and

also all issues fines and amercements from whatsoever pledges and mainpernors of any person dwelling within the same town of Nottingham or being there wholly or not wholly a tenant." The only word there beyond "amercements" on which any contention was based was the word "issues." It seems to be perfectly clear that the word "issues" means money issuing out of any property which may be taken, and not in any sense money issuing from a debt due to the Crown.

That being the state of the facts, we have first to consider what is the meaning of the word "amercements" in these charters; does it include a forfeited recognizance? Now, as to a forfeited recognizance, the question for the Court is not whether the procedure by bail is of the same character as, or analogous to, a fine or amercement, or whether in some respects the forfeiture of the bond may lead to consequences which are similar to a fine, but the question is whether the bail bond and its forfeiture is included in the language of the charters.

Now, in considering this question it is very important to observe the date of the charter of Henry IV. It is as early as 1399; but at that date, and long previously, the giving of bail bonds, the form of bail bonds, the proceedings which take place when they become forfeited, must have been well known to all persons cognizant of the law. At common law all felons were bailable: the account of that is to be found very fully in Chitty's Criminal Law, vol. i. p. 93, and vol. iv. p. 487, and the form of an estreat is given in which recognizances are mentioned in this way: "Extract of all the fines issues amerciaments recognizances and forfeitures." After that several statutes dealt with the question of bail bonds, and particularly in 1275 the Statute of Westminster, 3 Edw. 1, c. 15, has a provision that certain prisoners charged with high offences cannot be bailed at all: all which goes to shew that the question of bail was perfectly familiar and understood as a thing of itself. As time went on fines and amerciaments were less frequent, and the number of bail bonds seems to have increased, as one would expect in a country that was blessed with the freedom of England, and that those very severe fines

1897

NOTTINGHAM CORPORATION, *In re.*

Pollock B.

which were passed by lords of the manors and judges of smaller courts and so forth should be lessened from time to time; and notice of that is taken in several statutes curbing and keeping in order the rapaciousness of persons who made these fines. The number of bail bonds increased, and there are several more modern statutes by which the taking and return of fines and recognizances at quarter sessions, and the return of them to the Treasury, are governed. I may instance 22 & 23 Car. 2, c. 22, 4 & 5 Wm. & M. c. 24, 3 Geo. 4, c. 46, made perpetual by 4 Geo. 4, c. 37, and in each of these statutes the words used are "fines, issues, amerciaments, forfeited recognizances," shewing a recognised distinction by the Legislature between fine and amercement or a forfeited recognizance.

In Hale's Pleas of the Crown, vol. ii. c. 15, a full account is to be found of bail and mainprise. It is there pointed out that, although these same words are sometimes used promiscuously for the same thing, in a proper and legal sense they differ. "First. Always mainprise is a recognizance in the sum certain, but bail is not always so; secondly, he that is delivered per manucaptionem only is out of custody, but he that is bailed is in supposition of law still in custody, and the parties that take him to bail are in law his keepers and may reseize him to bring him in." A similar account of the bailment of prisoners by the sheriff, and the distinction between bail and mainprise, is to be found in Dalton's Office of the Sheriff, c. 96, where Manwood is cited as pointing out the distinction. In Termes de la Ley, a book of very high authority, both bail and mainprise are carefully defined as distinct things; of bail it is said: "Bail is when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty, and being by law bailable, offers sureties to those who have authority to bail him, which sureties are bound for him to the King's use in a certain sum of money or body for body, that he shall appear before the justices of gaol delivery at the next sessions, &c.; then upon the bonds of these sureties as is aforesaid he is bailed, that is, set at liberty, until the day appointed for his appearance." "Mainprise" is described in this way: "Mainprise is when a man is arrested by

capias, the judge may deliver his body to certain men to keep and to bring before him at a certain day, and these are called mainpernors, and if the party appear not at the day assigned the mainpernors shall be amerced."

With regard to the word "amercements," which are said by the corporation to include money payable on the forfeiture of recognizances, amercement, or being amerced (which, as I have already said, is the same thing as being in mercy), is clearly applicable to the case of a mainpernor who, failing to produce the body of a man for whom he has become liable, is subject to such amercement as the Court may think fit. In the case of bail, there is no amercement. The surety, by the language of the bond, becomes liable in such a sum as the Court may name as a debt of record to the Crown, and if he fails to render his principal at the time appointed, the recognizance is forfeited, and, being estreated into the Exchequer, payment is enforced. The same account both of "bail" and "mainprise" may be found in the law dictionaries of Cowel and Jacob, Comyn's Digest, and a great number of other books of authority. All are practically agreed upon the distinction which exists between the two. It seems to me, therefore, that the petitioners have failed to shew that this forfeiture of recognizances is brought within any of the words of these charters.

An argument was used on behalf of the Crown to which I ought to allude, as there is a principle involved in it. In the case stated for our opinion five instances are given, covering the space of a century between 7 Geo. 1 and 7 Geo. 4, in which in the Pipe Rolls, which shew the state of account as between the Crown and the burgesses of Nottingham, it appears that in dealing with money which had been taken by the sheriff and accounted for to the Crown as recognizances forfeited for bail bonds, that money was retained by the Crown, and not paid back again to the corporation of Nottingham. It was contended that this was a strong argument to shew the way in which the parties themselves had dealt with the subject-matter; but in truth this is not fit evidence for us to consider, for it cannot be said that this is such contemporaneous exposition as

1897

NOTTINGHAM CORPORATION, *In re.*

Pollock B.

could in any way govern or affect the language of the charters. What the advisers of the Crown or the corporation at that time may have thought about the matter is foreign to the question, because whatever they did, whether for a long time or a short time, might be done under a mistake or not, and cannot be said to govern the Court in any way; I need hardly say that the doctrine of estoppel cannot apply in a case of this kind. It must, therefore, be clearly understood that our judgment rests not on that conduct of the parties, but upon a proper construction to be put upon the charters.

There is only one other word which I should like to add, and it is with regard to a case which certainly is of great importance: *Rex* v. *Dover*. (1) A similar question arose there, whether the corporation of Dover or the Crown were entitled to certain fines. The word of that charter most applicable to the present case was the word "amercement"; but neither in the very learned judgment delivered by Parke B., who certainly would not have overlooked a matter of this kind, nor in the arguments, was this word alluded to; that case, therefore, cannot be said to be a decision upon the meaning of the word "amercement," but it is, nevertheless, a very strong case for the Crown. It is almost impossible to suppose that, if the very learned judge and counsel who dealt with that case had thought for a moment that a forfeited recognizance could be included under the term "amercement," the point would have been passed; that word however, and many others in the charter, were passed over without the slightest allusion.

On these grounds I think that there should be judgment, on the admission of the Attorney-General, for the corporation in respect of the fines, but that as regards the forfeited bail bonds our judgment should be for the Crown.

RIDLEY J. I am of the same opinion, and have but a few words to add. The words chiefly relied upon, and upon which the argument chiefly turns, are the following words in the charter of Henry VI.: "Also all issues fines and amercements from whatsoever pledges and mainpernors." I will not allude

(1) 1 C. M. & R. 726.

1897

NOTTINGHAM CORPORATION, *In re.*

Ridley J.

in detail to the other words, which have been dealt with by my learned brother; but Sir Robert Reid's argument was mainly concentrated on the words "fines and amercements from whatsoever pledges and mainpernors," and he contended that those words were large enough to include sums becoming due on recognizances: the question for us is whether that is so or not. It seems to me that in any proper sense it is difficult to read such words as including sums due on recognizances, for fines and amercements, properly speaking, seem to indicate sums exacted by the Court at its discretion; whereas the sums accruing on recognizances are fixed debts acknowledged to be due to the Crown which may be discharged by the fulfilment of a certain condition, or which on its non-fulfilment become absolute debts; indeed in practice, so far as I can gather from the early civil and Crown pleas, fines and amercements were in fact so imposed by the Courts at their discretion. Amercement meant the being in mercy, and it is marked by the word "misericordia" in the margin of each plea accordingly. This being in mercy might result from various causes. A suitor was in mercy if he failed in his suit, and an appellor was in mercy for withdrawing from an appeal according to the old practice for robbery or murder. A jury was in mercy for making a false presentment. These are but a very few out of a great many instances, and the ground upon which we are to-day seems to be travelled over by Stephen J. in his History of the Criminal Law, vol. ii. pp. 198, 199. The learned author alludes to the matter, and says that it seems as if money had to be paid to the king for nearly every step in every matter of public business. He goes on to say, after mentioning various instances in which these amercements became due by the practice of the Court: "How long this system lasted, or by what precise steps it fell into disuse, would take more trouble to discover than the discovery is worth." Probably that may be so, and it is not necessary for our purpose on the present occasion to go into the inquiry. Of course, subject to Magna Charta and the other provisions of the Legislature, these fines were entirely in the discretion of the Court. That makes, as it seems to me, a wide and substantial difference between such a

1897

NOTTINGHAM CORPORATION, *In re.*

Ridley J.

penalty or sum to be exacted, and the fixed debt which is acknowledged to be due by the person entering into a recognizance.

Reliance was also placed upon the words "from pledges and mainpernors," and those persons might at first sight be supposed to be in a somewhat similar position to persons who give bail on recognizances. Now it perhaps is not necessary to go into the distinction which exists between pledges and mainpernors. It is certainly very variously stated, and it is apparently obscure in its origin, and not always stated in precisely the same way by the different authorities; but supposing we take the case of a pledge, the pledge did not, as a person bound by recognizance does, acknowledge a debt as a debt due from him to the Crown. He was indeed sometimes responsible for a fixed amount from the beginning, as when, for instance, a person had become liable to an amercement or was in mercy, as I have already stated. The record continues to say, "and he gave pledges." The pledge in such a case was responsible, no doubt, for the fixed amount of the amercement; but it was a different thing, as it appears to me, when pledges were taken that, for instance, an appellor of murder or theft would prosecute his appeal. It does not seem to have been a universal rule that this responsibility of the pledge was from the beginning limited to a fixed sum; at all events, it is not usual for the record, which we are enabled to study nowadays, to state more than this, that pledges were taken; and it would seem probable that on the liability of the pledge being completed the sum for which he was answerable was then fixed by the Court, and not from the beginning.

Now, this seems to me to indicate strongly that there is a clear and substantial distinction between the ancient method of fines and amercements from pledges and mainpernors on the one hand, and the more modern system of recognizances on the other; but it must not be forgotten that from an early date also, as has been pointed out by my learned brother, certainly long before the charters in question, recognizances were known, and mention of them is found in the books elsewhere, though not in these charters. It is observable that in

the same work which I have already quoted, that of the late Mr. Justice Stephen, the subject of bail is treated as an entirely different and independent question from that of fines and amercements, and is to be found fully discussed in the first volume of his book at different places. But it is strong confirmation of the view which I am inclined to take to find that there was at the period when these charters were granted a system of bail and recognizance well known to the law, and that it is not mentioned, and the word finds no place in the charters which are granted to the town of Nottingham. It seems probable indeed that, while these fines and amercements, pledges and mainpernors gradually fell into abeyance along with the ancient method of trial, recognizances came into use with the increasing favour of trial by jury; still, however that may have been, that must have been in full force and effect at the time when these charters were granted, and it appears to me to be a very strong argument indeed in favour of the Crown when they are able to point out that the word does not occur in the charters.

I will add no more, except that the case of *Rex* v. *Dover* (1) does appear to me to be a strong authority upon this very point, although indeed the words "fines and amerciaments," which occur in the charter there under discussion, were not relied upon. The words were there, if it had been possible to rely upon them; but the argument really turned upon whether the word "forfeitures," which was there, did include the debts due on the recognizances. If it had been possible to contend that in the words "fines and amerciaments" were to be found the sums due on a forfeited recognizance, one would have expected most certainly that that argument would have been relied upon. Instead of that, we find that upon those words occurring in that very charter the argument proceeds simply on the word "forfeitures," which was held not to include recognizances. The case is worthy of observation for another reason, and that is, the precise nature of recognizances seems to be very clearly and accurately stated in the argument of Mr. Wightman for the Crown. Upon turning to those words,

(1) 1 C. M. & R. 726.

1897

NOTTINGHAM CORPORATION, *In re.*

Ridley J.

the distinction between that form and bail and the fines and amercements on the other hand becomes apparent.

For the reasons which I have given I agree in the opinion of my learned brother, and think that the judgment should be for the Crown as to the recognizances, and that the corporation is entitled to the fines and amercements.

Judgment accordingly.

Solicitors for corporation: *Sharpe, Parker, Pritchards & Barham, for Johnson, Nottingham.*

Solicitor for the Crown: *Solicitor to the Treasury.*

W. J. B.

1897
May 31;
July 3.

In re GORDON.
Ex parte NAVALCHAND.

Bankruptcy—Pending Action—Payment into Court with Denial of Liability —Payment into Court as Security for Costs—Secured Creditor—Rules of the Supreme Court, Order XXII., *r.* 6—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 168.

Where a defendant under the Rules of the Supreme Court, Order XXII., r. 6, pays money into court in satisfaction of the plaintiff's claim with a denial of liability, and becomes bankrupt before the trial, and the trustee in bankruptcy declines to be made a party to the action, the plaintiff is a secured creditor to the extent to which his proof in the bankruptcy for the amount claimed by him in the action is admitted by the trustee. If the proof when admitted is less than the sum so paid in, the plaintiff is a secured creditor only for the amount so admitted, and the trustee is entitled to the balance of the sum in court.

Directions as to how the costs should be dealt with in such a case when the plaintiff has paid money into court as security for the defendant's costs of the action.

THIS was a motion which raised the question whether the applicant was a secured creditor of the bankrupt under these circumstances.

On February 13, 1896, Santookchand Navalchand, an Indian banker trading as Keshevram Navalchand & Co. at Poona, commenced an action in the Queen's Bench Division of the High Court in London against J. Gordon to recover the sum of 118*l.* 19*s.* 2*d.*, alleged to be due for principal and interest

1897

GORDON, *In re.* NAVALCHAND, *Ex parte.*

on a dishonoured promissory note signed by the defendant J. Gordon.

On an application for judgment under Order XIV., the defendant J. Gordon obtained leave to defend, and subsequently, on November 4, paid into court to the credit of the action the sum of 48*l.* 5*s.* 11*d.* in satisfaction of the plaintiff's claim, with a denial of liability. He also obtained orders in the action under which the plaintiff paid into court the sum of 110*l.* 10*s.* as security for his costs of the action.

On December 14 the defendant J. Gordon filed his petition in bankruptcy, and the same day a receiving order was made and he was adjudicated bankrupt.

The official receiver, who was the trustee in bankruptcy, declined to be made a party to the action or to consent to payment out of court to the plaintiff of the said sums of 48*l.* 5*s.* 11*d.* and 110*l.* 10*s.* The plaintiff Navalchand thereupon applied to the Court of Bankruptcy for a declaration that he was entitled to the sums of 48*l.* 5*s.* 11*d.* and 110*l.* 10*s.* in court to the credit of the pending action in the Queen's Bench Division, for an order that the said sums might be paid out to him accordingly, and that he might be at liberty to prove in the bankruptcy for the amount of his principal, interest, and taxed costs, after giving credit for the 48*l.* 5*s.* 11*d.*

On the motion coming on for hearing, it was agreed that any question as to the jurisdiction of the Bankruptcy Court should be waived, and that the judge should decide the case on its merits.

Æneas Mackintosh, for the applicant. As to the 48*l.* 5*s.* 11*d.*, the plaintiff is a secured creditor: *In re Keyworth* (1); *In re Moojen.* (2) These are decisions under the Bankruptcy Act, 1869; but the definition of a "secured creditor" in that Act and in the Act of 1883 is the same.

[VAUGHAN WILLIAMS J. The issue in the action is not yet determined, and the trustee is not bound: *Maple & Co.* v. *Earl of Shrewsbury and Talbot.* (3)]

(1) (1874) L. R. 9 Ch. 379. (2) (1879) 12 Ch. D. 26.
(3) (1887) 19 Q. B. D. 463.

1897

GORDON, *In re.* NAVALCHAND, *Ex parte.*

The Court will not permit the trustee, who is an officer of the court, to evade liability by declining to be made a defendant.

As to the 110*l.* 10*s.*, the applicant is clearly entitled to have it paid out to him. It is his money.

Clayton, for the trustee in bankruptcy. The cases cited are distinguishable. In each of them money was paid into court as a condition for leave to defend. Here unconditional leave to defend was given, and subsequently the money was paid in with a denial of liability. The plaintiff has not applied within the time limited by Order XXII., r. 6, for payment out of the money to him. It therefore remains in court to abide the order of the Court, and is in the same position as money paid into court by a garnishee under s. 45 of the Bankruptcy Act, 1883, to abide the further order of the Court: *Butler* v. *Wearing*. (1) As to the 110*l.* 10*s.*, the trustee may have some claim for costs against it.

Mackintosh, in reply.

Cur. adv vult.

July 3. VAUGHAN WILLIAMS J. In this case the question is as to the right of the applicant to two sums of money paid into court before the date of the receiving order in an action against the bankrupt. One is a sum of 48*l.* 5*s.* 11*d.* paid into court by the defendant, together with a plea denying liability. The other is a sum of 110*l.* 10*s.* paid into court by the plaintiff at the instance of the defendant as security for the defendant's costs of the action. The trustee has not been made and declines to be made a party to the action. He has not actually admitted the plaintiff's claim, but, as I understand, does not contest his right to prove for something. I have no jurisdiction, sitting in bankruptcy, to make an order for the payment out of court of either of these sums; but both parties request that I will decide the question of right to these sums, and agree to consent to the necessary order in the Queen's Bench Division to give effect to my decision. As regards the sum of 110*l.* 10*s.* paid into court by the plaintiff under order of the Court as security for costs,

(1) (1885) 17 Q. B. D. 182.

I do not understand that it is seriously contended that he is not entitled to have that money paid out of court to him upon admission of his proof, subject of course to deduction of costs, if there be any such, in respect of which defendant on interlocutory proceedings may have obtained orders for costs in any event. But be this how it may, I have no doubt but that on his proof being admitted the plaintiff will be entitled to an order for payment of this sum, subject as aforesaid. The defendant in such case can never become entitled to payment to him or his estate of the costs to secure which the money was paid into court. As to the money paid into court with a denial of liability, I take it that the plaintiff, though out of time to accept in satisfaction the sum paid in, would, apart from bankruptcy, be entitled to get an order to withdraw his reply, and to give notice accepting the money paid in in satisfaction. I see nothing in the bankruptcy proceedings to prevent his so doing. But if he does this, he of course would not be entitled to prove for any balance of the debt. If, on the other hand, the plaintiff does not elect to take the money out of court in satisfaction, I think that his proper course is to tender a proof in bankruptcy for the full amount of his claim. Then, if the proof is admitted, or partially admitted, as the case may be—rejected, I understand, it will not be—the issue in the action will in my opinion have been determined, and an order may be made in the action in the Queen's Bench Division for the payment of the money out of court to the proper party, according to the result of the application to prove. It is quite true that in *Maple & Co.* v. *Shrewsbury* (1) the Court of Appeal decided that no order could be made for payment out of the money until the action had been tried or disposed of—that is, so long as the question of liability remained in any way undetermined; but I think that, in the case of an action for a mere money demand, it has been disposed of and the liability determined so soon as the proof has been dealt with in the bankruptcy. The Court of Bankruptcy is the proper Court to determine the question of liability in such a case; and I am

(1) 19 Q. B. D. 463.

1897

GORDON, *In re.* NAVALCHAND, *Ex parte.*

Vaughan Williams J

clearly of opinion that if the proof is admitted, or to the extent to which it is admitted, the plaintiff is a secured creditor by reason of the payment into court. The money paid into court, even with a plea denying liability, has become subject to the plaintiff's claim by the act of the defendant, who thereby agrees that the sum paid in shall remain in court subject to the conditions of Order XXII., r. 6. It is not a question of execution at all, but of the effect of a conventional charge. It is in effect a conditional payment to the plaintiff. The money is to be the money of the plaintiff if he succeeds in establishing his title to it: *In re Moojen.* (1) If the plaintiff's proof is admitted in full, he can amend his proof immediately on the admission by deducting from his proof the amount of security which thereupon accrues to him by reason of his right to take the money out of court; or, if the proof is admitted for a less amount than the money in court, he can withdraw his proof, and consent to an order that the balance shall be paid out to the trustee. The costs of this application must be paid out of the estate.

Solicitor for applicant: *E. W. Hurd.*
Solicitors for trustee: *Rising & Ravenscroft.*

(1) 12 Ch. D. 26.

H. L. F.

WATKINS *v.* BARNARD.

1897
July 15.

Bankruptcy—Execution levied for over 20*l.—Sale by Sheriff—Notice of Bankruptcy Petition—Death of Judgment Debtor—Administration Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125, *sub-s.* 6—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2.

The sheriff sold under an execution levied for more than 20*l.*, and within the fourteen days limited by sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, received notice of a bankruptcy petition against the judgment debtor, who died shortly afterwards. After the fourteen days the sheriff received notice of a petition under s. 125 of the Bankruptcy Act, 1883, for the administration of the estate of the deceased debtor, on which an administration order was subsequently made:—

Held, that the judgment creditor was under the circumstances entitled to the money in the hands of the sheriff.

Observations as to the extent to which the provisions of Part III. of the Bankruptcy Act, 1883, are applicable to an administration of a deceased debtor's estate under s. 125 of that Act.

Quære, whether an administration order is equivalent to a receiving order for the purposes of s. 11 of the Bankruptcy Act, 1890.

THIS was an interpleader issue which raised the question whether the judgment creditor or the trustee in bankruptcy of the estate of the judgment debtor was entitled to the money in the hands of the sheriff.

On March 8, 1897, C. Barnard signed judgment against A. Cronmire in an action in the Queen's Bench Division for 956*l.* 11*s.* 6*d.*, and on March 9, 1897, issued execution on his judgment, and the sheriff seized.

On March 13 A. Cronmire paid the sheriff 300*l.* on account of the judgment debt; and on March 29 the sheriff sold the goods seized under the execution by private treaty to one Tolkien for 660*l.*

On April 6 S. Falconer, another judgment creditor, presented a bankruptcy petition against Cronmire returnable on April 26; and on April 7 notice of this petition was served on the sheriff.

On April 17 A. Cronmire died.

On April 24 one Robertson, another judgment creditor of A. Cronmire, presented a petition under s. 125 of the Bankruptcy

1897

WATKINS v. BARNARD.

Act, 1883, for the administration in bankruptcy of the estate of A. Cronmire, deceased, and the same day the official receiver was appointed interim receiver of the estate. Notice of this petition was the same day served upon the sheriff.

On April 26 Falconer's petition in bankruptcy was by consent dismissed, and an administration order was made on Robertson's petition.

On May 11 H. Watkins was appointed trustee in bankruptcy of the estate of A. Cronmire, deceased.

Both Barnard and Watkins claimed the 660*l.* in the hands of the sheriff, and thereupon this interpleader issue was directed.

H. Reed, Q.C., and *R. G. Willis*, for the plaintiff, the trustee in bankruptcy. The money in the hands of the sheriff is the property of the bankrupt. Within the fourteen days limited by sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, the sheriff had notice of a bankruptcy petition, and although no order was made on this petition, yet he afterwards had notice of the petition for administration on which an order was made. The Act does not say that a receiving order must be made within the fourteen days, and the words "or on any other petition of which the sheriff has notice" are wide enough to include a petition for administration, and the Act does not say that this notice must be within the fourteen days. It is submitted that this notice takes effect if given at any time before the sheriff has paid over the money, and that an administration order under s. 125 of the Bankruptcy Act, 1883, is equivalent to a receiving order.

Jelf, Q.C., and *Hume Williams*, for the defendant, the execution creditor. Here the execution was completed before notice of any bankruptcy petition or receiving order against the debtor, and therefore s. 45 of the Bankruptcy Act, 1883, does not apply. Neither does s. 11, sub-s. 2, of the Act of 1890 deprive the defendant of the fruits of his execution, because the bankruptcy petition of which the sheriff had notice during the fourteen days was dismissed. The notice required by the sub-section must be a notice given within the fourteen days. Further, an

administration order is not equivalent to a receiving order. Sub-s. 6 of s. 125 of the Bankruptcy Act, 1883, does not incorporate all the provisions of Part III. of that Act to the case of an administration order, but only such as are applicable thereto. Sect. 125 only deals with the administration of the estate of a deceased insolvent, and does not include other people's property; and ss. 45 and 46 of the Act of 1883 and s. 11 of the Act of 1890 have no application to such a case: *In re Gould.* (1)

R. G. Willis, in reply.

VAUGHAN WILLIAMS J. The question is as to what effect, if any, s. 11 of the Bankruptcy Act, 1890, has upon the rights of the execution creditor in this case. The dates are not material, but the consecution of events is material, and the consecution of events is this. There was judgment. There was execution levied on that judgment by the sheriff, who seized and sold and received the proceeds of sale from the purchaser. Then the sheriff, by the terms of s. 11, sub-s. 2, had to hold the proceeds of sale for fourteen days, and nobody doubts or disputes that s. 11, sub-s. 2, had that amount of application. The meaning of the Legislature is really abundantly clear. The Legislature thinks that if a man has a judgment for a sum exceeding 20*l.* and cannot satisfy it, and execution is put in upon his goods for the payment of that debt, there is an inherent probability that that man may be insolvent, and in such a state of insolvency that his goods ought to be distributed amongst his creditors rateably, and the natural step for arriving at that result is a petition in bankruptcy; and the Act of Parliament says, although there has been no bankruptcy, although there has been no administration order of any sort or kind, the sheriff, in this state of probability of insolvency and probability of distribution under the Bankruptcy Act, shall hold the proceeds for fourteen days in order to see whether there will be a bankruptcy or not. And that is what was happening in the present case. The goods had been sold, the execution did exceed 20*l.*, and the sheriff, in obedience to the statute, was holding the

(1) (1887) 19 Q. B. D. 92.

1897

WATKINS v. BARNARD.

Vaughan Williams J.

proceeds for those fourteen days, and received notice of a bankruptcy petition against the debtor. Now, it is impossible to say that under those circumstances the execution creditor had acquired an absolute title to those proceeds. He had acquired a title to those proceeds subject to the contingency that if the bankruptcy supervened his title was to be superseded. In that state of things the bankrupt, or the debtor rather, dies; and then the question is, there having been in consequence of his death an administration order under s. 125 of the Act of 1883, whether sub-s. 6 of that section makes s. 11 of the Act of 1890 so apply as to defeat the defeasible title of the execution creditor. Sub-s. 6 says: "With the modifications hereinafter mentioned all the provisions of Part III. of this Act relating to the administration of the property of a bankrupt shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." Now, Mr. Jelf suggested that the words in s. 11 are not the apt words to use in the case of an administration order. He says that the words used are "bankruptcy petition," and that an administration order is not an order upon a bankruptcy petition. I do not assent to that argument. If I think that there is any section in Part III. of the Act which is applicable to an administration order, I shall apply that section notwithstanding the fact that the words used in the section are words apt to bankruptcy, and not words apt to administration orders. If I did not do that, the result would be that no part of Part III. could be applied to an administration order at all. Part III. runs from s. 37 down to s. 65, and if the sections are looked at, the words used in every case are words of bankruptcy. The first part deals with the proof of debts. Then it goes on to tell you what debts shall not be provable in bankruptcy, and what debts shall be provable in bankruptcy. If Mr. Jelf's argument was of any validity, he could say s. 37 does not apply, because it is speaking of debts provable in bankruptcy, and there is no bankruptcy here; and just in the same manner, as to mutual credit and set-off, he would have to say it speaks of "bankrupt," and there is no mention of "deceased debtor." For

these reasons, I do not think that argument is of any validity at all. But then Mr. Jelf called my attention to the case of *In re Gould* (1), which is an authority that binds me. But I have to see what that authority says, and generally it may be said to say this—that it was not intended by sub-s. 6 of s. 125 to enlarge the assets of a deceased debtor by taking other persons' property, but that what s. 125 does is, that it applies Part III. of the Bankruptcy Act, where applicable, to the estate of the deceased. Now I wish to point out that Part III. is itself divided up into sub-headings. It begins, "Part III." Then "Administration of Property" is the large heading. "Proof of Debts" is the first sub-heading. "Property available for Payment of Debts" is another sub-heading. "Effect of Bankruptcy on antecedent transactions," which begins at s. 45, and runs down to s. 49, is another sub-heading. "Realization of Property," which begins at s. 50 and goes down to s. 57, is another sub-heading. "Distribution of Property" is the last sub-heading of Part III. Now, nothing would have been easier for the Legislature than to say, if they intended so to say, that of Part III. those parts which relate to "proofs of debts," "realisation of property," and "distribution of property," shall apply to an administration order under s. 125; but those parts of Part III. which come under the headings "Property available for Payment of Debts," and "Effect of Bankruptcy on antecedent transactions," shall not apply. But they have not said so; and it seems to me that as they have not said so, it is right that I should assume they did not intend to say so; and therefore, if there are any sections coming under one of those two heads, I should apply them to an administration order under s. 125 if I think they are applicable. And the question whether they are applicable or not seems to me to depend, having regard to the decision of *In re Gould* (1), upon whether this particular money in the hands of the sheriff was or was not part of the assets of the deceased at the time of the making of the administration order. I have come to the conclusion that these particular moneys in the hands of the sheriff had, in the facts of the present case, ceased to be property

(1) 19 Q. B. D. 92.

1897

WATKINS v. BARNARD.

Vaughan Williams J.

which was part of the estate of the deceased. The proceeds were the property of the execution creditor subject only to a particular defeasance; and in my judgment the time within which that defeasance could effectively take place had come to an end at the time of the making of this administration order. The proceeds were received on March 29, and the administration order was not made until April 24. Now, the fourteen days would begin to run from the receipt of the proceeds, and it would continue to run for fourteen days; and within that fourteen days it seems to me that no administration order, and consequently no receiving order in bankruptcy, was made, because what s. 11 of the Act of 1890 says is: "Where under an execution in respect of a judgment for a sum exceeding 20*l.*, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee." Now, I do not understand it to be said that there was any other petition of which the sheriff had notice within the fourteen days, even if you treat the petition for the administration order as being a petition in bankruptcy. I am anxious to decide it upon that ground, because I am unwilling to decide so broad a proposition as I was invited to, that s. 45 of the Bankruptcy Act, 1883, and s. 11 of the Bankruptcy Act, 1890, can in no case apply to an administration order. Having regard to the fact that the Legislature has not thought fit to exclude from the application to an administration order those parts of Part III. which come under the headings "Property available for Payment of Debts," and "Effect of Bankruptcy on antecedent transactions," I do not wish to decide, until it shall become necessary, whether or not there are any cases in which those provisions might be held to apply. It seems to me that in the present case it cannot be held so as to apply because the whole

1897

WATKINS v. BARNARD.

Vaughan Williams J.

of the fourteen days had elapsed, not only without any receiving order being made on the bankruptcy petition in respect of which the sheriff had notice while he had the proceeds in his hands, and which petition was ultimately dismissed, but also because upon the agreed facts here he had no notice of any other petition within the fourteen days, even if you include under the head of petition, the petition for an administration order.

There will be judgment for the defendant, and an order that the amount in the hands of the sheriff be paid to the defendant's solicitor, and that the plaintiff pay the costs.

Solicitor for plaintiff: *H. H. Boorne.*

Solicitors for defendant: *Blyth, Dutton & Co.*

H. L. F.

MURPHY, APPELLANT *v.* ARROW, RESPONDENT. (1)

1897

Nov. 1, 2.

*Gaming—Betting-house—Person found therein—Arrest on Warrant—Power to bind over—Evidence—*33 *Hen.* 8, *c.* 9, *s.* 9—2 *Geo.* 2, *c.* 28, *s.* 9—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *ss.* 3, 6, *First Schedule—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3, 11.

A person who is found in a betting-house, and is arrested on a warrant, under 16 & 17 Vict. c. 119, s. 11, can be bound over, under 33 Hen. 8, c. 9, s. 9, no more to play, haunt, or exercise, from thenceforth at any gaming-house, notwithstanding that there is no evidence against him, beyond the fact of his having been found in such betting-house.

CASE stated by a metropolitan police magistrate.

At the Marlborough Street Police Court, on May 5, 1897, it was proved that the appellant, and eighty-eight other men then present, were arrested at a house, 32, Gerard Street, Soho, called the Frascati Club, on a warrant issued under 16 & 17 Vict. c. 119, s. 11, and evidence was given that the premises were kept and used for the purpose of betting with persons resorting thereto, and the magistrate thereupon remanded all the men so arrested, upon recognizances to appear on May 12.

Against four of the men so arrested information was subsequently laid, and summonses granted, under 16 & 17 Vict.

(1) Before Lindley M.R. and Chitty L.J. sitting as a Divisional Court.

1897

MURPHY v. ARROW.

c. 119, s. 3, for having kept the house for the purpose of betting with persons resorting thereto, or for having assisted in conducting the business of such house.

On May 12 three of the men so summoned pleaded guilty, and were fined, and the fourth was discharged.

The appellant, and eighty-four other men arrested as aforesaid, were then before the magistrate to be dealt with under the warrant according to law.

The only evidence before the magistrate touching the appellant and the eighty-four other men was, that they had been arrested at 32, Gerard Street, Soho, known as the Frascati Club, that those premises had been kept and used by one Martin Wilson for the purpose of betting with persons resorting thereto, and that betting was going on just prior to the entry of the police.

The magistrate was asked to discharge the appellant and the eighty-four other men, and his attention was called to the words, "persons there haunting resorting and playing," in 33 Hen. 8, c. 9, s. 9, and to the words, "used or exercised any unlawful game," in 2 Geo. 2, c. 28, s. 9, and it was contended that such words could not apply to the case of the appellant and the eighty-four other men, inasmuch as they were merely arrested upon the premises, without any evidence as to the length of time they had been there, or whether they had ever been there before, or even as to what individually they were actually doing there on the occasion in question.

It was further contended that, although a betting-house, within 16 & 17 Vict. c. 119, s. 1, is declared by s. 2 to be a gaming-house, within 8 & 9 Vict. c. 109, yet betting on horse-races is not a game, nor an unlawful game, such as to make it "playing," within 33 Hen. 8, c. 9, s. 9, or "an unlawful game," within 2 Geo. 2, c. 28, s. 9, and that both those statutes affect only players of unlawful games, and do not extend to persons betting upon horse-races in a betting-house declared to be a gaming-house by the statute.

On the other hand, attention was called to the observations of Hawkins J. in his judgment in *Jenks* v. *Turpin* (1), and to

(1) (1884) 13 Q. B. D. 505, at p. 526.

the subsequent practice of the magistrates of the police courts of the metropolis in similar circumstances, and the magistrate declined to discharge the appellant and the eighty-four other men, and, following the practice, hitherto unquestioned, of his colleagues since the case of *Jenks* v. *Turpin* (1), he ordered the appellant to be bound in his own recognizances, in the sum of 20*l*., "no more to play, haunt, or exercise from thenceforth" at any gaming-house, pursuant to 33 Hen. 8, c. 9, s. 9. (2)

(1) 13 Q. B. D. 505.

(2) The statutes on which this case turned are as follows:—

33 Hen. 8, c. 9, s. 9: "It shall be lawful to all and every the justices of peace . . . . from time to time . . . . as need and case shall require, to come, enter, and resort into, all and every houses, places, and alleys where such games shall be suspected to be holden, used, exercised, or occupied, contrary to the form of this statute; and as well the keepers of the same, as also the persons there haunting, resorting, and playing, to take, arrest, and imprison, and them so taken and arrested to keep in prison unto such time as the keepers and maintainers of the said plays and games have found sureties to the King's use, to be bound by recognizance or otherwise, no longer to use, keep, or occupy, any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves, or else with sureties, by the discretions of the justices, ... no more to play, haunt, or exercise, from thenceforth, in, at or to any of the said places, or at any of the said games." [This section was referred to as s. 14 in the case, but in the folio edition of the Statutes of the Realm the number is 9.]

By 2 Geo. 2, c. 28, s. 9, "Where it shall be proved upon the oath of two or more credible witnesses, before any justice or justices of the peace, as well as where such justice or justices shall find upon his or their own view that any person or persons have or hath used or exercised any unlawful game contrary to the said statute (33 Hen. 8, c. 9), the said justice or justices shall have full power and authority to commit all and every such offender and offenders to prison, without bail or mainprise, unless and until such offender and offenders shall enter into one or more recognizance or recognizances, with sureties or without, at the discretion of the said justice or justices of the peace, that he or they respectively shall not from thenceforth play at or use such unlawful game."

By the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 3, provision is made for the entry into gaming-houses, and arrest of persons found therein (except in the metropolitan police district) under warrant; and the section concludes, "and any such warrant may be in the form given in the First Schedule annexed to this Act."

Sect. 6 empowers the Commissioners of Police of the Metropolis to authorize a superintendent and constables to enter any gaming-house, "and to take into custody all persons who shall be found therein."

The first schedule to the Act gives the form of warrant, directing the constable to enter the house, and to arrest, search, and bring before a justice of the peace, "as well the keepers of the same as also the persons

1897

MURPHY v. ARROW.

The question for the opinion of the Court was, whether the magistrate, upon the above state of facts, came to a correct determination and decision in point of law.

Nov. 1. *Purcell*, for the appellant. The order of the magistrate, that the appellant be bound over, was wrong. 33 Hen. 8, c. 9, s. 9, does not apply, for that section only gives power to bind over the keepers of the houses, &c., and "the persons there so found." These last words must be read as referring back to the earlier words of the section, "the persons there haunting, resorting, and playing." Here there is no evidence against the appellant of "haunting, resorting, and playing." No penalty is imposed by the Betting Act, 1853 (16 & 17 Vict. c. 119), except, by s. 3, on owners, occupiers, and persons having the care or management of, or assisting in conducting the business of, betting-houses. The reason for the power, given by s. 11, to arrest persons found in the house, is, in order that those who turn out to be owners, occupiers, or managers may be prosecuted, and the others, if necessary, called upon to give evidence. This is shewn by the later statute, 17 & 18 Vict. c. 38, s. 5, by which persons arrested may be compelled to give evidence. 2 Geo. 2, c. 28, s. 9, only applies to persons

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there haunting, resorting, and playing, to be dealt with according to law."

The Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1, prohibits the keeping of any house, office, room, or other place, for the purpose of betting with persons resorting thereto, and provides that "every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 2: "Every house, room, office, or place, opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house, within the meaning of the Gaming Act, 1845."

Sect. 3 imposes penalties on the owners, and occupiers, and persons conducting the business, of betting-houses.

By s. 11, "It shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, office, room, or place, to be kept or used as a betting-house or office, contrary to this Act, to give authority by special warrant . . . . to any constable or police officer to enter . . . . into such house, office, room, or place, ... and to arrest, search, and bring before a justice of the peace all such persons found therein; . . . . and any such warrant may be according to the form given in the first schedule annexed to the Gaming Act, 1845."

who have used or exercised an unlawful game. Betting on races is not such a game. The appellant, not being required for the purpose of giving evidence, was entitled to be immediately discharged.

Danckwerts, for the respondent. The appellant's contention would make the legislation absurd, for it would be idle to authorize the arrest of a man who would be entitled to immediate discharge. Reading all the statutes together, the result is that all betting-houses are now made gaming-houses, to which the provisions of 33 Hen. 8, c. 9, s. 9, apply. Being found on premises where gaming is going on is some evidence of playing. The magistrate has a discretion, and if he thought it was not made out that the man was there for the purpose of playing, he would discharge him. The words of the warrant in the schedule to the Gaming Act, 1845, support the view taken by the magistrate. The language of Hawkins J. in *Jenks* v. *Turpin* (1) is quite general, and is wide enough to cover the present case; he said: "In the course of the argument it was asked, what is the magistrate to do with persons taken into custody in a common gaming-house under the authority of 33 Hen. 8, c. 9, or 8 & 9 Vict. c. 109, ss. 3, 6? It is not necessary now to answer that question; but I would refer to s. 14 (9.) of 33 Hen. 8, c. 9, which does not seem to have been repealed, and from which it would seem that the justices have power to require recognizances from such persons no more to haunt such gaming-houses or to play at such prohibited games."

Purcell replied.

Cur. adv. vult.

Nov. 2. The following judgments were delivered:—

LINDLEY M.R. This is a case stated by a metropolitan police magistrate, raising a question of some importance under the Betting Act. The question on which our opinion is asked is, whether, on the facts stated in the case, the magistrate came to a correct determination and decision in point of law. The facts, stated shortly, were, that a raid was made on a betting-house, and a number of persons found there were

(1) 13 Q. B. D. 505, at p. 526.

1897

MURPHY v. ARROW.

Lindley M.R.

arrested under a warrant, and the keepers of the house were afterwards summoned, and pleaded guilty, and were fined, and a number of persons, of whom the appellant was one, against whom the only evidence was that they had been arrested on the premises which had been kept and used for the purpose of betting with persons resorting thereto, in fact who were merely present, were bound over (to put it shortly) not to do it again. The question which we have to decide is, whether the magistrate had power to order the appellant to enter into any recognizances, or was bound immediately to let him go. This question turns on four Acts of Parliament, 33 Hen. 8, c. 9, 2 Geo. 2, c. 28, 8 & 9 Vict. c. 109, and 16 & 17 Vict. c. 119, for nothing I think turns on 17 & 18 Vict. c. 38, s. 5, which only makes the persons arrested compellable to give evidence. In considering the effect of the legislation the proper starting point is the Betting Act, 1853 (16 & 17 Vict. c. 119). Sect. 2 of that Act is very important. It provides that every house, &c., opened, kept, or used for the purposes referred to in s. 1, that is, as a betting-house, shall be taken and deemed to be a common gaming-house within the meaning of 8 & 9 Vict. c. 109. The first question to consider with reference to this provision is, what conceivable object could there be in treating such houses as common gaming-houses, if no consequences were to follow in the case of persons who resorted to and used them? Then s. 11 of the Betting Act, 1853, gives authority to a justice to issue a warrant to a constable to enter any such house, "and to arrest, search, and bring before a justice of the peace, all such persons found therein," and further provides that the warrant may be according to the form given in the first schedule to 8 & 9 Vict. c. 109. Now we have to consider what is the object of these provisions. In the first place, betting-houses are to be deemed and taken to be common gaming-houses; secondly, power is given to arrest persons found therein; and, thirdly, the warrant may be according to the form in the first schedule to 8 & 9 Vict. c. 109. The most important provisions of the Gaming Act, 1845 (8 & 9 Vict. c. 109), so far as the present case is concerned, are ss. 3 and 6, and the first schedule. Sects. 3 and 6 authorize the arrest of persons found in gaming-

houses under warrants, which "may be in the form given in the first schedule annexed to this Act." That is the same form as is referred to in 16 & 17 Vict. c. 119, s. 11. The first schedule gives the form of warrant, directing the constable to enter the house, and to arrest, search, and bring before a justice of the peace, "as well the keepers of the same as also the persons there haunting, resorting, and playing, to be dealt with according to law." Therefore the power given by ss. 3 and 6 is to take into custody the persons "found therein," whereas the warrant directs the arrest of "the persons there haunting, resorting, and playing." These words have reference to the terms of 33 Hen. 8, c. 9, s. 9, which authorizes justices to enter houses, &c., where unlawful games are suspected to be holden, and arrest the keepers of the houses and the persons there haunting, resorting, and playing, and keep them in prison until they find sureties; "and also that the persons there so found be in like case bound by themselves, or else with sureties, by the discretions of the justices, &c., no more to play, haunt, or exercise from thenceforth in, at or to any of the said places, or at any of the said games." Then 2 Geo. 2, c. 28, s. 9, relieves the justices of the necessity of personally visiting the houses, and empowers them to act on evidence. Thus there is a concatenation of statutory provisions, the result of which is that it is perfectly lawful, not only to arrest persons found in betting-houses, but also to bind them over not to do any of the acts prohibited by the Act of Henry VIII. In short, the Acts of 16 & 17 Vict. c. 119 and 8 & 9 Vict. c. 109 confer the power to bind over persons found in betting-houses as if they were persons resorting to gaming-houses. The contention on behalf of the appellant entirely gives the go-by to the form of the warrant. For these reasons I am of opinion that the decision of the magistrate was right, and his order must stand.

CHITTY L.J. I agree. Eighty-nine persons, including the appellant, were arrested in a betting-house, and, of these, four were charged with keeping the house, and three of them were convicted. There was no evidence against the appellant, except that he was found in the house, and that betting was

1897

MURPHY v. ARROW.

Chitty L.J.

going on there just before the entry by the police; and it was contended on his behalf that he ought to have been then and there discharged, for it was urged that the magistrate had no power to order him to enter into recognizances. I think, however, that the magistrate had such power. The Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3, imposes penalties on people conducting the business of keeping betting-houses. It is true that no penalty is expressly imposed by that Act on persons resorting to such houses; but by s. 1 such houses are declared to be common nuisances and contrary to law, and by s. 2 every such house is to be taken and deemed to be a common gaming-house, within the meaning of 8 & 9 Vict. c. 109. That throws us back to the Gaming Act, 1845 (8 & 9 Vict. c. 109), and we have to trace the course of legislation down from 33 Hen. 8, c. 9, s. 9. By s. 2 of the Betting Act, 1853, a betting-house is to be taken and deemed to be a common gaming-house, within the meaning of the Gaming Act, 1845, and, taking the whole of the legislation together, I am of opinion that the intention and effect is to bring such a case as the present within the statutes relating to gaming-houses. The Gaming Act, 1845, in the first schedule, also gives the form of the warrant, and in my opinion this is a matter of very considerable importance, for the language used in the warrant refers us back to the statute of 33 Hen. 8, c. 9, and the language used in the warrant is made applicable to persons found in betting-houses, while 33 Hen. 8, c. 9, s. 9, empowers justices of the peace to enter gaming-houses, and bind over the persons there found. This entry is not now made by the justices in person, but is made by the police acting under a warrant, and the justices have now the same power as to binding over as when they acted only under the Statute of Henry VIII. It is difficult to see what could be the object of justifying the arrest of persons found on the premises, if such persons when arrested were entitled to be at once discharged. Reading the different Acts of Parliament together, in my opinion the result is that we have a series of statutes authorizing such an order as has been made by the magistrate in the present case. I think, therefore, that the conclusion arrived at by the magistrate was correct; it is not

only his own individual opinion, but, as he states in the case, he has followed the practice of his colleagues.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitors for respondent: *Wontner & Sons.*

P. B. H.

ATTORNEY-GENERAL *v.* BEECH AND ANOTHER.

1897
July 28.

Revenue—Estate Duty—Marriage Settlement—Appointment by Tenant for Life subject to Life Interest—Subsequent Surrender of Life Interest in favour of Remainderman—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2, *sub-s.* 1 (*b*).

By s. 1 of the Finance Act, 1894, estate duty is made payable on the principal value of all property, real or personal, settled or not settled, which passes on the death of any person dying after the commencement of that part of the Act. By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased includes "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

The tenant for life of certain property comprised in a marriage settlement with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest in the settled property to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son:—

Held, that upon the death of the tenant for life estate duty became payable in respect of the property appointed to the son as being property passing on her death within the meaning of the Finance Act, 1894.

INFORMATION by the Attorney-General claiming estate duty under the Finance Act, 1894.

By a settlement dated July 13, 1852, made in contemplation of the marriage of William Philip Beech with Eliza Catherine Prince Howard, it was (inter alia) declared that all property, real or personal, to which the wife was or might become entitled under certain wills, or of or to which the wife or the husband in her right should become seised, possessed, or entitled during the intended coverture in possession, reversion, remainder or otherwise, should forthwith after the same should become vested in

1897

ATTORNEY-GENERAL v. BEECH.

possession be conveyed to the trustees of the settlement upon trust for sale and conversion; during the joint lives of husband and wife the trustees to pay the income of the trust funds to the wife for her separate use without power of anticipation, and in case of her surviving her husband to pay the income to her and her assigns during her life, and after her decease upon trust as to the capital of the trust fund and the income thereof for the then children of the husband and their issue as well as the children or more remote issue of the intended marriage, or for any one or more of them as (in the events which happened) the wife might after the death of her husband by deed or will appoint.

The said intended marriage was duly solemnized, and Mrs. Beech survived her husband, who died in 1885. By an indenture of December 21, 1886, Mrs. Beech exercised the power of appointment contained in the marriage settlement in favour of the defendant Howard Beech and Catherine Henrietta Greig, the sole children of the marriage, exclusively of the other children of her husband, the appointment to Howard Beech being subject to the life interest of Mrs. Beech in the funds so appointed to him.

By an indenture of December 18, 1894, Mrs. Beech surrendered to Howard Beech and William Beech, the then trustees of the settlement, her life interest in the property appointed to Howard Beech, as described in the schedule thereto, to the end and intent that such life interest might merge in the interest in remainder of Howard Beech. On August 27, 1896, Mrs. Beech died.

The information claimed that upon the death of Mrs. Beech estate duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, became payable upon the principal value of the trust property comprised in the schedule to the indenture of December 18, 1894, as property passing on her death within the meaning of the Act. (1)

(1) By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, in the case of every person dying after the commencement of that part of the Act estate duty is made payable upon the principal value of all property, real or personal, settled or not settled, "which passes on the death of such person."

By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased is to

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *Sir R. T. Reid, Q.C.* (*The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) and *Vaughan Hawkins* with them), for the Crown. The liability to estate duty depends upon whether this property passed at the death of the tenant for life, and the real question is whether, since the Finance Act, property passes or is to be deemed to pass at that date although the tenant for life has assigned the life interest to the person entitled in remainder. The property here dealt with is clearly settled property, being property comprised in a settlement within the meaning of s. 2 of the Settled Land Act, 1882, the definition of "settlement" in which section is incorporated in the Finance Act, 1894, by s. 22, sub-s. 1 (*i*). By s. 5, sub-s. 2, settlements only pay duty once during the duration of the settlement; and s. 2, sub-s. 1 (*b*), in effect provides for the date when the estate duty in respect of settled property is to be paid. It might be successfully contended that property passed under s. 1 on the death of the tenant for life; it clearly passed under s. 2, sub-s. 1 (*b*). The latter sub-section says that property passing on the death is to be deemed to include property in which the deceased or any other person had an interest ceasing on the death; and here either the deceased herself or some other person had such an interest. The life interest did not become extinguished for the purposes of this Act upon its assignment to the remainderman; but the other side must contend that by reason of such assignment no property passed or must be deemed to pass upon the death of the life tenant. But there is no difficulty in keeping a life estate alive after assignment to the remainderman for the purpose of avoiding priorities; and here the life estate must be treated as existing after assignment for the purposes of the Finance Act. Some effect must be given to the words "or some other person," and they must here be interpreted, if necessary, to include the remainderman; if, therefore, the effect of the assignment was to divest the tenant for life of all

be deemed to include . . . . "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . . ."

1897

ATTORNEY-GENERAL v. BEECH.

interest in the property, yet the remainderman had in respect of that life estate an interest which ceased on the death of the deceased. The liability to duty cannot depend on the insertion in the assignment of the words "to the intent that the said life interest shall merge in the interest in remainder," which is a mere conveyancing formula; what is to be looked at is the plain language of the section.

Levett, Q.C., and *W. M. Spence*, for the defendants. The effect of the assignment of the life estate to the remainderman was that the life estate was at once annihilated, and the remainderman came into possession of the whole estate because the life estate was gone: this is not a mere rule of conveyancing, but is part of the common law. The life tenant having no interest left in the property, her death is an immaterial fact, for there was no property which passed or could be deemed to pass at that date; no benefit accrued to the remainderman by the cesser of any interest. Under the Succession Duty Act, 1853, the acceleration of remainders by reason of the assignment to the remainderman of the prior estate is expressly dealt with by s. 15, with the result that when the time comes for paying the duty the same duty must be paid as if there had been no extinction of the prior estate; the very point raised in the present case is there specifically provided for, but it is not provided for in the Finance Act. Estate duty is a devolution duty, the essence of which is that it depends upon death; if the death does not affect the property, no devolution duty is payable. The doctrine that, where the life estate and the reversion are vested in the same person in the same right there is a merger of the life estate, was approved and acted upon by the Court of Appeal in *In re Radcliffe, Radcliffe* v. *Bewes* (1); that case really decides the very point here in issue.

[They also cited *In re Earl Cowley's Estate* (2); Sheppard's Touchstone, p. 301; 57 & 58 Vict. c. 30, s. 7, sub-s. 7.]

POLLOCK B. This case is one of considerable importance, but I do not think it necessary to call upon the counsel for the Crown for a reply.

(1) [1892] 1 Ch. 227. (2) [1897] 2 Q. B. 47.

The first point we have to consider is this: that the object of the Finance Act is to levy upon all property, real or personal, settled or not settled, estate duty. The time at which that duty is to be payable is fixed, and fixed with reference to the death of a person who has been the owner of, or has enjoyed, the property in question. That being so, we start with a proposition which is not included in the ordinary common law principle (as it is admitted on both sides, and as we have it laid down again and again, especially by Lord Westbury); these Acts are not to be construed in accordance with the ordinary language of conveyancers, or in accordance with what is supposed to give effect to the principles upon which conveyancers would act; they are to be construed, as indeed all other Acts are, with a view to carrying out what is supposed to be the intention of the Act and its provisions as expressed by the language used. That being so, the language of the Act, to my mind, is not at all difficult to construe. It may be that it disturbs old ideas in the minds of conveyancers upon particular points; but, in construing an Act of Parliament which creates a tax upon property and then goes on to say at what time that tax shall be paid, I do not find any difficulty in dealing with the matter. Sect. 2 says that "property passing on the death of the deceased shall be deemed to include the property following, that is to say"; therefore the very language of the Act shews that it is dealing with something wholly different from the ordinary rules by which the devolution of property is governed. Sub-s. 1 (*a*) deals with property which the deceased was, at the time of his death, competent to dispose of; there is no difficulty about that. Then (*b*) is: "Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Now, that obviously includes not merely property in which the deceased alone had an interest, but it includes property in which "the deceased or any other person" had an interest; this means, to take a common case, that though a person had under a settlement an interest for life only, or apart from the settlement an interest for life only, if a person dealt with that interest by way of

1897

ATTORNEY-GENERAL v. BEECH.

Pollock B.

sale or mortgage, then the death of that person is fixed as the date at which the duty is to be payable, notwithstanding the fact that he has divested himself of the legal interest and has transferred it to the assignee. That in itself seems to me to shew that, in using this language, the statute merely means the fixing of what is supposed to be a fair and reasonable period at which the incidence of taxation must take place.

Now, if those words stood alone and were construed without any argument, it seems to me clear that the present case would be included within them, and that this was property in which, not the deceased, but some "other person, had an interest ceasing on the death of the deceased." That is to say, that the life interest was conveyed to that other person, and would not be property of the deceased, but would be the property of that other person. Then it is said, "Why cannot you read into that section the words 'or any other person other than the person to whom, under the devolution of the settlement, the property would come, apart from any deed or contract or conveyance'?" Speaking for myself, I must decline to do so, for that would be to deal with an Act of Parliament in a manner which I am not entitled to do. I should be expressing an opinion upon a matter which has already been expressly dealt with by the words of the Act (which I think are plain and obvious), and as being the proper method of dealing with this matter; and when once we admit that that is the proper mode of dealing with it, then it is only necessary to see whether there is anything which obviously, by adopting that construction, clashes with the general intention of the statute, or with the particular language that is used elsewhere. I find nothing of the kind; on the contrary, I think that s. 5, which has been alluded to several times, shews how separate estates are dealt with, and that it is a section which is drawn in accordance with the view I have taken of the Act of Parliament.

Then with regard to the mere amount to be paid, that is really not a matter for us to discuss at all; that is settled by another section, the principle of which is perfectly applicable to the construction of the Act which I am placing upon it, and which is that which we are asked to place upon it by the

respondents in this case. It seems to me, therefore, without reference to a great many arguments which one might balance upon one side and upon the other, that the conclusion to which I have come is the only one to which this Court ought to come under the circumstances of this case; that that conclusion can be worked out fairly and in accordance with what has been conceived to be the intention of this Act generally, there can be no manner of doubt. I must, therefore, hold that the Crown are entitled to our judgment.

RIDLEY J. I am of the same opinion. The Act was passed for the purpose of placing a duty upon property passing on the death of any person, and, as was suggested by Sir Robert Reid in the argument, it is not always clear what property passes on the death of a person, because there are cases in which a settlement comes into question, and all the property, therefore, is not entirely in one person to the exclusion of everybody else. When, therefore, the Legislature came to deal with property under settlement, it was necessary to pass some clause relating specially to such property, and we find it in s. 2 of this Act, the terms of which have been referred to in the case which has been argued before us. I have very little to add to what has been said by my brother Pollock upon that section. It appears to me that it begins by defining property passing on the death of a deceased person in this way: that it shall be deemed to include certain heads of property, one of which is, "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." Now, it is not easy to read those words as exempting the property in question in this case without putting some other words into the section, and, according to the contention of the defendants, the language of the section should be, "property in which the deceased or any other person had"—at the time of the death of the deceased—"an interest ceasing on the death of the deceased," or it should be, "property in which the deceased or any other persons than those who were to benefit by the death of the deceased had an interest ceasing on the death of the deceased." If those words were there they would have this effect—that

1897

ATTORNEY-GENERAL v. BEECH.

Ridley J.

they would exclude from duty the property which it is to my mind the specific intention of the Act to include. The words as they stand include all property—"property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest," including in every particular the property which is the subject of this appeal, with only this exception, that it has been disposed of by an intermediate deed to one of the persons who is the remainderman; but he is the "other person" contemplated by this section, and I think it is fair and proper to read the words with that meaning, because the whole intention and scope of the Act of Parliament are that he should be included. If it had been intended that by transfer of interest the property should be exempted from estate duty, it would have been easy to say so; and it is observable that sub-s. 3 of s. 2 deals with one particular exception which was put in by the Legislature when they were dealing with this property, but it does not include this mode of endeavouring to escape the payment of the duty. If we were to allow that this had been contemplated as a possible mode of escaping from the duty by the Legislature, we should, I think, be going completely in the face of the intention of the Legislature, not only as expressed in this section, but as it is to be found in s. 5 relating to settled property, and also in s. 7, which alludes to the calculation of the benefit that arises. I do not think that the authorities quoted relating to conveyancing, or with regard to the effect of the surrender of one interest merging or not merging into another, have much bearing upon the matter; the question is, what is the meaning of the Finance Act; and that is to be judged of by its intent and by its clear and expressed object, and not by the rules of conveyancing. For these reasons I agree that this estate is liable to the duty.

Judgment for the Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *W. Carpenter & Sons.*

W. J. B.

SEAL *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL.

1897
July 10.

Local Government—Drain or Sewer—Single Drain draining several Houses—Liability to Repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41 —*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe passing through private property received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority, who had adopted the Public Health Acts Amendment Act, 1890, took proceedings against the owners of the said houses under s. 41 of the Public Health Act, 1875:—

Held, following *Bradford* v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, and disapproving *Hill* v. *Hair*, [1895] 1 Q. B. 906, that the pipe in question was a single private drain within the meaning of s. 19 of the Act of 1890.

CASE stated by justices under the Summary Jurisdiction Acts.

The Tydfils Well Building Club, of which the appellant was the secretary and receiver of the rents, had erected a number of houses within the district of the Merthyr Tydfil Urban District Council. A drain was made by the club running at the back of the houses through the gardens, and this drain joined the sewer of the district council. A connection from each house with the drain at the back was made by a branch drain. The drain could not be used by any other premises than the houses erected by the club, and it commenced at the back of No. 40 of such houses, and extended from there at the back of the houses until it reached the council's sewer.

This drain, having been badly made, became a nuisance, and the district council, which had adopted the Public Health Act, 1890, took proceedings against the appellant under s. 41 of the Public Health Act, 1875, as extended by s. 19 of the Public Health Act, 1890.

The justices found that the appellant was the owner of the premises as defined by s. 4 of the Public Health Act, 1875; that the drain was a drain used by two or more houses belonging to different owners; that it was a drain for the particular

1897

SEAL v. MERTHYR TYDFIL URBAN COUNCIL.

houses and for no other premises, and that it was not a general drain into which any houses could be drained. They, therefore, decided that the drain was a private drain within the meaning of s. 19 of the Public Health Act, 1890 (1), and that the council had a right to proceed under s. 41 of the Public Health Act, 1875. They consequently ordered the appellant to abate the nuisance.

Macmorran, Q.C. (*Plews* with him), for the appellant. The facts in this case are indistinguishable from those in *Hill* v. *Hair* (2) and *Bradford* v. *Eastbourne Corporation* (3), in which the decisions of the Divisional Courts were opposed. *Hill* v. *Hair* (2) decides that such a drain as this is not a "single private drain" within the meaning of s. 19; but that decision is disapproved in *Bradford* v. *Eastbourne Corporation.* (3) [He also cited *Travis* v. *Uttley* (4); *Self* v. *Hove Commissioners* (5); *Reg.* v. *Corporation of Hastings.* (6)]

Brynmôr Jones, Q.C., and *S. T. Evans*, for the respondents, were not called upon to argue.

CAVE J. I think that this case may be decided on the decision in *Bradford* v. *Eastbourne Corporation* (3) without calling on the respondents' counsel.

By the Public Health Acts of 1848 and 1875 all sewers were vested in the local authority, and sewers were defined as drains

(1) By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19—

"(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.

"(2.) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly.

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

(2) [1895] 1 Q. B. 906.
(3) [1896] 2 Q. B. 205.
(4) [1894] 1 Q. B. 233.
(5) [1895] 1 Q. B. 685.
(6) [1897] 1 Q. B. 46.

which received the drainage of more than one house. Some difficulties then arose because where a man built two houses on his land and made a common drain for them both, that drain within the definition of the Public Health Acts became a sewer, and as such vested in the local authority. It was said, however, that where the two or more houses were in the same curtilage the drain, so long as it was in private property, could not be said to be a sewer at all, and, therefore, did not come within the general enactment and did not vest in the local authority. Then another difficulty arose, namely, where two or more houses belonging to different owners were drained by a pipe connecting with a sewer connecting in its turn with the general system of sewage. To all intents and purposes that pipe, so long as it passed through private land, was a private drain, and it seemed hard that the public should have to pay for its maintenance although they were not at liberty to connect with and drain into it. To meet that difficulty s. 19 of the Public Health Act, 1890, was passed, which provides that where two or more houses belonging to different owners are connected with a public sewer by a single private drain an application may be made under s. 41 of the Public Health Act, 1875, by which the local authority may recover from the owners of the houses the expenses incurred in executing any works in respect of such drain, and by sub-s. 3, "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

What, then, is the "single private drain" to which s. 19 applies? I think it is a drain constructed on private ground to which the public has no access. The public are relieved by the section from the cost of repairing that which they cannot use.

The drain here was not only a drain used for the drainage of more than one building, but it was a drain which was not open to public user. Where a drain goes through private land, although it may be used by several houses, it remains a private drain. I think that if the drain in *Hill* v. *Hair* (1) was a private drain the law was wrongly applied there. In my opinion this case is governed by the decision in *Bradford* v. *Eastbourne*

(1) [1895] 1 Q. B. 906.

1897

SEAL v. MERTHYR TYDFIL URBAN COUNCIL.

Cave J.

Corporation. (1) If the drain in *Hill* v. *Hair* (2) was a private drain, then it was not a sewer which vested in the local authority, because the public are at liberty to connect their drainage with a sewer though they are not at liberty to do so with a private drain. If that is so, the decision in *Hill* v. *Hair* (2) misinterpreted the position of the drain in question. It is not very clear on the case as reported as to how that was; but I am inclined to think that the drain there was a private drain, and, consequently, that that decision was wrong. Directly a private drain comes out of private property, it becomes a sewer if it receives the drainage of more than one house, and as such it vests in the local authority and can be used by the public for the purpose of connecting their drainage with it. The public can use it, and therefore they must pay for its maintenance. I am of opinion that the drain in this case was within s. 19, and that the justices were right.

RIDLEY J. I am of the same opinion. The difficulty has been removed by the decision in *Bradford* v. *Eastbourne Corporation.* (1) The finding of the magistrates here that this drain was not a general drain corresponds very nearly with the language used by the Lord Chief Justice in that case. When once it is found that this was a single private drain there is no difficulty in saying that the justices came to a right conclusion.

Appeal dismissed.

Solicitors for appellant: *Morgan & Upjohn, for John Vaughan & Son, Merthyr Tydfil.*

Solicitors for respondents *Schultz & Son, for Gwilym C. James, Merthyr Tydfil.*

(1) [1896] 2 Q. B. 205. (2) [1895] 1 Q. B. 906.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1897
Nov. 19.

HUNT *v.* HUNT.

Husband and Wife—Separation by Agreement—Covenant not to Molest—Divorce Proceedings in Foreign Country.

Where a deed of separation between husband and wife contains a covenant by the former not to molest the latter, the taking proceedings in a foreign court to procure a divorce is not of itself, and without evidence of an intention to annoy, a breach of the covenant.

Decision of Wright J., ante, p. 304, reversed.

APPEAL from a judgment of Wright J., reported ante, p. 304, where the facts are fully stated.

The action was brought by a wife against her husband for breach of a covenant not to molest contained in a separation deed. The defendant left England and went to reside in the State of Texas, in the United States of America, and he there set on foot proceedings in the District Court of El Paso with a view to obtain a divorce on the ground of desertion by his wife at a date antecedent to the separation deed. The wife commenced this action for damages for breach of covenant and an injunction.

It was tried before the learned judge without a jury, and judgment was given for the plaintiff with damages, and an injunction granted restraining the defendant, his agents and servants, "from doing any act or taking any proceedings in this country for continuing or prosecuting the proceedings commenced by him, or any similar future proceedings, in the District Court of El Paso against the plaintiff for dissolution of the marriage contracted between the plaintiff and the defendant." (1)

The defendant appealed.

The defendant in person contended that, in order to constitute a breach of a covenant not to molest, an intention to molest must be shewn; that taking proceedings in the Divorce Court in this country would not, in the absence of proof of such an

(1) Ante, p. 304.

C. A. 1897

HUNT v. HUNT.

intention, be a breach of the covenant; and that the fact that the proceedings were taken elsewhere did not, taken by itself, make any difference. [He cited *Flower* v. *Flower* (1), *Fletcher* v. *Rodgers* (2), *Thomas* v. *Everard* (3), *Warrender* v. *Warrender* (4), *Fearon* v. *Aylesford* (5), and *Rowley* v. *Rowley*. (6)]

T. Atkinson, Q.C., and *Herbert Jacobs*, for the plaintiff, contended that the taking of proceedings in a court in which the separation deed could not be set up in answer, as the law of Texas does not recognise the validity of such a deed, so that the plaintiff would be compelled either to go to Texas to defend herself, or to submit to a decree against her, was in itself molestation, or at the least was evidence of an intention to molest, and that apart from this there was at the trial evidence of such intention.

A. L. SMITH L.J. This is an application to set aside the judgment entered for the plaintiff and to enter a judgment for the defendant.

It appears that the plaintiff and the defendant were married in 1868, and that in 1880 a separation deed was executed which contained a covenant by the defendant that he would not molest his wife. In September, 1896, he left this country and went to Texas, and the suggestion is that he did so in order to get, in that country, a divorce from his wife, as the law of Texas does not recognise deeds of separation, and so in suing for a divorce on the ground of desertion he would not be hampered by the deed. For the purpose of that suit it was necessary that the wife, who was in this country, should be served with notice of the proceedings, and this was done. The notice further stated that application would be made to take the depositions of witnesses. The plaintiff thereupon brought this action, and a judge at chambers granted an injunction in wide terms. This order of the learned judge came before this

(1) (1872) 20 W. R. 231.
(2) (1878) 27 W. R. 97.
(3) (1861) 6 H. & N. 448; 30 L. J. (Ex.) 214.
(4) (1835) 2 Cl. & F. 488.
(5) (1884) 14 Q. B. D. 792.
(6) (1866) L. R. 1 H. L., Sc. 63.

Court on appeal, and this Court, without going into the question whether the conduct of the defendant amounted to molestation, affirmed the injunction, but in more limited terms.

Several points have been taken on the present appeal which appear to me to be without substance, and the only real point in the case is whether, when this action was tried, there was evidence of molestation before the learned judge. I think the question has been practically decided by the judgment in *Thomas* v. *Everard*. (1) In that case it was held that bringing a suit in the Divorce Court for a judicial separation was not a breach of a covenant not to molest, and that to make it a breach of covenant there should have been in the deed a covenant not to take legal proceedings.

The question as to what is molestation is dealt with in *Fearon* v. *Aylesford* (2), and, without reading the judgments at length, I may say that they amount to this—that to constitute a breach of such a covenant there must be in fact molestation and an intention to annoy. The matter is thus put by Cotton L.J. at p. 805 of the report: "Of course I must consider what 'molestation' is. I have satisfied myself, that in order to come within this covenant it must be some act done by the lady herself which annoys Lord Aylesford, but that it is not sufficient merely to shew that she has done an act which annoys Lord Aylesford, and in my opinion the first branch of the definition given by the Master of the Rolls really involves the whole, namely, that in order to hold that there has been molestation within the words of the covenant, there must be an act done by Lady Aylesford with the purpose and intent to annoy and injure, and of course when a person does an act the natural tendency of which is to annoy and injure, primâ facie she must be supposed to have that intention." With the view thus expressed I entirely agree.

Of course there may be acts done of such a nature that it is obvious that the intention to annoy existed, but if this is not obvious the matter must be looked into to see if such intention did exist. It appears to be clear that the object of the defendant in taking proceedings in Texas was to get a divorce, which he

(1) 6 H. & N. 448; 30 L. J. (Ex.) 214. (2) 14 Q. B. D. 792.

C. A. 1897

HUNT v. HUNT.

A. L. Smith L.J.

could procure more easily there than elsewhere. The question then arises, Did he go to Texas for the purpose of taking proceedings to annoy his wife, or for the purpose of proceedings to obtain a divorce? I do not find that my brother Wright dealt with the question of intention, though he dealt with the question of the annoyance to the wife that would follow from the proceedings. The letters which were put in tended to shew that the intention of the plaintiff was not to annoy.

The only conclusion I can draw from the facts of this case is that the defendant went to Texas for the real purpose of carrying on divorce proceedings there, and not for the purpose of annoying his wife; and in my opinion the plaintiff cannot, in these circumstances, enlarge the meaning of the word "molest" to cover this act of the defendant.

I think, therefore, that this appeal should be allowed, and that judgment should be entered for the defendant.

RIGBY L.J. I am of the same opinion. It is clear on the authorities and reasonable in itself that a covenant not to molest is not the same as a covenant not to take any legal proceedings. The learned judge who tried this case came to the conclusion that it was vexatious to take proceedings in the courts of Texas. I do not think that we can lay down that the taking of such proceedings is necessarily vexatious, at any rate the object of such proceedings is ambiguous. They may be taken for the purpose of annoying the wife, and if so there might be molestation within the covenant in the deed. I am not disposed to differ from the view that my brother Wright appears to have taken that the intention of the defendant in going to Texas was to obtain a divorce; but I cannot on the evidence come to the conclusion that his intention was to annoy his wife, and the learned judge has not found that such was his intention. I agree that where that which is done is open to two constructions, those who argue that it amounts to molestation must shew that there was an intention to molest, though it is otherwise where the act itself shews by its nature that such was the intention. The evidence in the case seems to me to shew rather that he did not intend to annoy, and

under these circumstances no legal molestation has been shewn which would amount to a breach of the covenant in the separation deed.

COLLINS L.J. I am of the same opinion. It is clear that a covenant not to molest does not cover and is not intended to cover the same ground as a covenant not to take legal proceedings. From this it appears that vexation or annoyance in fact is not necessarily a breach of a covenant not to molest, for proceedings in a Divorce Court cannot be otherwise than an annoyance, but they are not necessarily a breach of the covenant, as was held in *Thomas* v. *Everard*. (1) The law upon this point does not stop there, for we have the authority of *Fearon* v. *Aylesford* (2), that to constitute a breach of such a covenant there must be not merely the fact of annoyance, but an intent to annoy. Proceedings might be so clearly without foundation as to amount to cogent evidence of an intention to annoy; but if they do not of themselves necessitate such an inference, some other evidence of intention must be shewn. If proceedings are taken in this country or elsewhere in the hope of getting relief from the marital tie, they afford in themselves no evidence of an intention to molest or annoy, and that intention was not, in my opinion, established by the evidence before the learned judge. The judgment was based on a conclusion from which I do not dissent, that the defendant went to Texas in order to institute proceedings for a divorce; but there is no evidence that he instituted those proceedings with any other intention than that of obtaining a divorce. It is not shewn that he has broken his covenant not to molest, and I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *J. F. Rowe.*

(1) 6 H. & N. 448; 30 L. J. (Ex.) 214.

(2) 14 Q. B. D. 792.

A. M.

END OF VOL. II.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1897 will be as follows :—

In the First Series,
[1897] 1 Ch. [1897] 2 Ch.

In the Second Series,
[1897] 1 Q. B. [1897] 2 Q. B. [1897] P.

In the Third Series,
[1897] A. C.

INDEX.

ABANDONMENT—Notice of—Recovery of ship —Total loss - - - 135
See INSURANCE, MARINE. 2.

ACTION—*Cause of—Nervous Shock—Practical Joke causing—Remoteness of Damage.*
The defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill :—
Held, that these facts constituted a good cause of action.
Victorian Railways Commissioners v. *Coultas*, (1888) 13 App. Cas. 222, and *Allsop* v. *Allsop*, (1860) 5 H. & N. 534, considered. WILKINSON *v.* DOWNTON - - - **Wright J. 57**

ADMINISTRATION—Of bankrupt estate—Sale by sheriff—Notice of bankruptcy petition - - - - - 521
See BANKRUPTCY. 1.

AFFIDAVIT—Production of documents—Discovery - - - **62, 111**
See PRACTICE. 2, 5.

AGRICULTURAL HOLDINGS—Compensation—Market gardeners - - - 475
See LANDLORD AND TENANT. 1.

ALE HOUSE ACT, 1842—Offences - - 37
See LICENSING ACTS. 3.

ALIMONY—Proof—Arrears accrued due before receiving order - - - 439
See BANKRUPTCY. 5.

AMERCEMENT—Forfeited recognizance—Construction of charter to corporation 502
See REVENUE. 5.

ANNUITY—Security for payment of—Stamp
See REVENUE. 9. 316

APPOINTMENT—Subsequent surrender of life interest—Estate duty - - 535
See REVENUE. 2.

APPORTIONMENT—Dock charges and expenses —Ship surveyed while in dock for Lloyd's classification - - 456
See INSURANCE, MARINE. 3.

ARREARS—Of alimony accrued due before receiving order—Proof - - 439
See BANKRUPTCY. 5.

ARREST—Betting-house—Person found therein —Power to bind over—Evidence 527
See GAMING. 1.

—— Riding bicycle at night without proper light—Justification - - 452
See BICYCLE.

ASSESSMENT—Water—Rate—Annual value
See WATERWORKS. 209

ASSIGNMENT—Covenant against—Forfeiture
See LANDLORD AND TENANT. 2. 218

—— Right of unregistered assignee to sue 1
See COPYRIGHT.

BAILIFF (HIGH)—Fees—Practice - 429
See COUNTY COURT. 1.

BANKRUPTCY—*Execution levied for over 20l.—Sale by Sheriff—Notice of Bankruptcy Petition—Death of Judgment Debtor—Administration Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125, *sub-s.* 6—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2.
The sheriff sold under an execution levied for more than 20*l.*, and within the fourteen days limited by sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, received notice of a bankruptcy petition against the judgment debtor, who died shortly afterwards. After the fourteen days the sheriff received notice of a petition under s. 125 of the Bankruptcy Act, 1883, for the administration of

BANKRUPTCY—*continued.*

the estate of the deceased debtor, on which an administration order was subsequently made:—

Held, that the judgment creditor was under the circumstances entitled to the money in the hands of the sheriff.

Observations as to the extent to which the provisions of Part III. of the Bankruptcy Act, 1883, are applicable to an administration of a deceased debtor's estate under s. 125 of that Act.

Quære, whether an administration order is equivalent to a receiving order for the purposes of s. 11 of the Bankruptcy Act, 1890. WATKINS *v.* BARNARD - - **Vaughan Williams J. 521**

2. —— *Fraudulent Preference—Bill of Exchange—Payment of overdue Acceptance—Onus of Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), s. 48.

When a bill of exchange is not presented for payment at maturity but is held over at the request of the acceptor and subsequently paid, such a payment is not within the principle of *In re Clay & Sons*, (1895) 3 Manson, 31, and may be a fraudulent preference within s. 48 of the Bankruptcy Act, 1883.

When a trustee in bankruptcy proves that the debtor was insolvent at the time when he made the payment that is impeached as a fraudulent preference, the onus of proof shifts, and the party supporting the payment must shew that it was not made with the view of preferring him. *In re* EATON & Co. *Ex parte* VINEY

Vaughan Williams J. 16

3. —— *Fraudulent Preference—Conveyance to make good Breaches of Trust—Revocable Mandate—Evidence—Notes of Bankrupt's Examination—Deposit of Share Certificates—Declaration of Trust.*

A bankrupt, two days before his bankruptcy, executed a deed, by which he conveyed an estate to a person upon trust to raise thereout by sale or mortgage 4200*l.*, and therewith to make good divers breaches of trust which he had committed in respect of certain scheduled trust estates of which he was trustee. By the deed he charged the property conveyed with the payment of the 4200*l.*, and conferred on the grantee, his executors or administrators, a power to appoint new trustees. The deed was not communicated to any of the beneficiaries:—

Held, that the deed was not a revocable mandate, but created the relation of trustee and cestui que trust as between the grantee and the persons interested in the trust estates and was consequently irrevocable:

Held, also, that the deed was not a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883, because the object of the bankrupt in executing it was not to prefer some creditors to others, but to shield himself from the consequences of the breaches of trust committed by him:

Held, also, that answers made by the bankrupt on his public examination ought not to be given effect to as evidence to invalidate the deed against the beneficiaries.

The bankrupt shortly before his bankruptcy deposited certificates of shares in a box with memoranda to the effect that they were deposited

BANKRUPTCY—*continued.*

as securities for the moneys due to the several trust estates. The certificates remained in his custody and control, and the transaction had not been communicated to the beneficiaries:—

Held, that the transaction constituted a good declaration of trust in respect of the shares in favour of the trust estates.

Middleton v. *Pollock*, (1876) 2 Ch. D. 104, approved of. NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING - - - - **C. A. 19**

4. —— *Petitioning Creditor's Debt—Bill of Exchange given for Amount of Debt—Determination of Credit by act of Bankruptcy.*

A petition in bankruptcy alleged as the petitioning creditor's debt a sum due for goods sold and delivered. Previously to the commission of the alleged act of bankruptcy, the debtor had given to the petitioning creditor bills of exchange for the price of the goods, which bills had not matured at the date of the presentation of the petition:—

Held, that the only effect of taking the bills was to give the debtor a period of credit, that by the act of bankruptcy the period of credit was determined, and that the petitioning creditor's debt was correctly stated in the petition. *In re* RAATZ. *Ex parte* RAATZ - - **Div. Ct. 80**

5. —— *Proof—Alimony—Arrears accrued due before Receiving Order—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), s. 37.

Arrears of alimony payable by a debtor to his wife under an order of the Probate and Divorce Division of the High Court of Justice, which accrue due before the making of a receiving order against the debtor, are not provable by the wife in the debtor's bankruptcy.

Per Hawkins and Vaughan Williams JJ. (Wright J. dissentiente). KERR *v.* KERR

Div. Ct. 439

6. —— *Reputed Ownership—Bill of Sale—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), s. 44, *sub-s. iii.—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), s. 7.

Where the grantor of a bill of sale has become bankrupt before making any default in payment of the sums thereby secured, his possession of the goods assigned by it under such circumstances that he continues to be the reputed owner thereof is a possession by him with the consent of the true owner within the meaning of s. 44, sub-s. iii., of the Bankruptcy Act, 1883. *In re* GINGER. *Ex parte* LONDON AND UNIVERSAL BANK

Div. Ct. 461

7. —— *Sale by Trustee to Partner of Member of Committee of Inspection—Sale at an Undervalue—Damages—Delay—Bankruptcy Rules*, 1886, *r.* 316.

The sale of a bankrupt's property by the trustee in bankruptcy to a partner of a member of the committee of inspection, such partner buying for himself and not for the benefit of the partnership, does not fall within the mischief of rule 316 of the Bankruptcy Rules, 1886, which enacts that "neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, ... either directly or indirectly, by himself or any partner, clerk, agent, or servant, become pur-

BANKRUPTCY—*continued.*

chaser of any part of the estate"; neither does the principle of *Ex parte Moore*, (1881) 51 L. J. (Ch.) 72, apply.

In 1889 a trustee, with the approval of his committee of inspection, sold part of a bankrupt's estate to S. The sale was at an undervalue to the knowledge of all parties concerned. A creditor of the bankrupt became aware of the transaction in March, 1891, but took no steps to impugn it until February, 1897:—

Held, that the creditor's right to relief against S. was not barred by laches and acquiescence. *In re* GALLARD. *Ex parte* GALLARD

Vaughan Williams J. 8

8. —— *Secured Creditor—Pending Action—Payment into Court with Denial of Liability—Payment into Court as Security for Costs—Rules of Supreme Court, Order XXII., r. 6—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss*, 45, 168.

Where a defendant under the Rules of the Supreme Court, Order XXII., r. 6, pays money into court in satisfaction of the plaintiff's claim with a denial of liability, and becomes bankrupt before the trial, and the trustee in bankruptcy declines to be made a party to the action, the plaintiff is a secured creditor to the extent to which his proof in the bankruptcy for the amount claimed by him in the action is admitted by the trustee. If the proof when admitted is less than the sum so paid in, the plaintiff is a secured creditor only for the amount so admitted, and the trustee is entitled to the balance of the sum in court.

Directions as to how the costs should be dealt with in such a case when the plaintiff has paid money into court as security for the defendant's costs of the action. *In re* GORDON. *Ex parte* NAVALCHAND - **Vaughan Williams J. 516**

—— Loan in consideration of share of profits—Postponement to other creditors - **495**
See PARTNERSHIP.

BANKRUPTCY RULES, 1886, r. 316 - **8**
See BANKRUPTCY. 7.

BARRATRY—Of master—Mortgagee of ship **311**
See INSURANCE, MARINE. 1.

BENEFIT BUILDING SOCIETY—Interest of money lent to borrowing member—Income tax - - - - **402**
See REVENUE. 6.

BETTING—"Place" used for—Inclosure on race-course - - - - **242**
See GAMING. 2.

BETTING-HOUSE—Person found therein—Arrest—Power to bind over—Evidence **527**
See GAMING. 1.

BIAS—Disqualification—Prosecution by council—Adjudication by ordinary member
See JUSTICES. **468**

BICYCLE—*Arrest of Rider—Justification—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 85.

A constable who sees a person riding a bicycle at night without a proper light, contrary to the provisions of s. 85 of the Local Government Act, 1888, has no power to stop him for the purpose of ascertaining his name and address. HATTON *v.* TREEBY - - - - **Div. Ct. 452**

BILL OF EXCHANGE—Determination of credit by act of bankruptcy - - **80**
See BANKRUPTCY. 4.

—— Fraudulent preference—Onus of proof **16**
See BANKRUPTCY. 2.

BILL OF SALE—Reputed ownership - **461**
See BANKRUPTCY. 6.

BREACH OF CONTRACT—Licensee's right of action - - - - **445**
See LICENCE.

BREACH OF COVENANT—Not to assign—Forfeiture - - - - **218**
See LANDLORD AND TENANT. 2.

BROKER—Liability for premium—Custom **93**
See INSURANCE, MARINE. 4.

BUILDING SOCIETY—Interest of money lent to borrowing member—Income tax - **402**
See REVENUE. 6.

BY-LAW—Rural sanitary authority—Cesspools in connection with buildings - **433**
See LOCAL GOVERNMENT. 1.

CAPTURE—Notice of abandonment—Recovery of ship—Total loss - - - **135**
See INSURANCE, MARINE. 2.

CASES—*Allsop* v. *Allsop*, (1860) 5 H. & N. 534, considered - - - - **57**
See ACTION.

—— *Attorney-General* v. *Emerson*, (1882) 10 Q. B. D. 191, principle applied - **384**
See PRACTICE. 4.

—— *Attorney-General* v. *London Corporation*, (1850) 2 Mac. & G. 247, principle applied - - - - **384**
See PRACTICE. 4.

—— *Bradford* v. *Eastbourne Corporation*, (1896) 2 Q. B. 205, followed - - **543**
See LOCAL GOVERNMENT. 2.

—— *Bustros* v. *White*, (1876) 1 Q. B. D. 423, considered - - - - **188**
See PRACTICE. 6.

—— *Clay & Sons, In re*, (1895) 3 Manson, 31, principle of, inapplicable - - **16**
See BANKRUPTCY. 2.

—— *Davis* v. *Treharne*, (1881) 6 App. Cas. 460, followed - - - - **165**
See MINE.

—— *Doe* v. *Grafton*, (1852) 18 Q. B. 496, commented on - - - - **475**
See LANDLORD AND TENANT. 1.

—— *Doe* v. *Massey*, (1851) 17 Q. B. 373, distinguished and considered - - **143**
See LIMITATIONS, STATUTE OF.

—— *Duffy* v. *Hanson*, (1867) 16 L. T. 332, approved - - - - **122**
See SOLICITOR. 2.

—— *Hawke* v. *Dunn*, [1897] 1 Q. B. 579, disapproved of - - - - **242**
See GAMING. 2.

—— *Hennessy* v. *Wright*, (1888) 24 Q. B. D. 445, followed - - - - **188**
See PRACTICE. 6.

—— *Hill* v. *Hair*, [1895] 1 Q. B. 906, disapproved
See LOCAL GOVERNMENT. 2. **543**

CASES—*continued.*
—— *Lester* v. *Torrens*, (1877) 2 Q. B. D. 403, considered - - - - 33
See LICENSING ACTS. 2.
—— *Marine Insurance Co.* v. *China TransPacific Steamship Co.*, (1886) 11 App. Cas. 573, followed - - - - 456
See INSURANCE, MARINE. 3.
—— *Middleton* v. *Pollock*, (1876) 2 Ch. D. 104, approved - - - - 19
See BANKRUPTCY. 3
—— *Moore*, *Ex parte*, (1881) 51 L. J. (Ch.) 72, principle of, inapplicable - - 8
See BANKRUPTCY. 7.
—— *Moxham*, *The M.*, (1876) 1 P. D. 107, rule in, applied - - - - 231
See LIBEL. 2.
—— *Pearce* v. *Bunting*, [1896] 2 Q. B. 360, disapproved of - - - - 334
See THAMES.
—— *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, rule in, applied - - - - 231
See LIBEL. 2.
—— *Pye* v. *Butterfield*, (1864) 5 B. & S. 829, approved - - - - 111
See PRACTICE. 2.
—— *Seward* v. *Dennington*, (1896) 44 W. R. 696, overruled - - - - 111
See PRACTICE. 2.
—— *Tinkler* v. *Wandsworth District Board of Works*, (1858) 2 De G. & J. 261, followed
See LOCAL GOVERNMENT. 3. 357
—— *Victorian Railways Commissioners* v. *Coultas*, (1888) 13 App. Cas. 222, considered 57
See ACTION.
—— *Wood* v. *Boosey*, (1867) L. R. 2 Q. B. 340, dictum of Cockburn C.J. in, not followed
See COPYRIGHT.
—— *Wood* v. *Leadbitter*, (1845) 13 M. & W. 838, distinguished - - - 445
See LICENCE.
CERTIORARI—"Off-licence"—Order sanctioning removal—Notice of application 308
See LICENSING ACTS. 1.
CESSPOOL—Application of by-law to old buildings - - - - - 433
See LOCAL GOVERNMENT. 1.
CHARTER—To corporation—Forfeited recognizance—Amercement - - 502
See REVENUE. 5.
CHARTERPARTY—Custom—Inconsistency with contract - - - - 83
See SHIP. 1.
—— Insufficient depth of water in dock—Detention of ship - - - - 485
See SHIP. 2.
CLERGY—Deprivation—Subsequent deposition by bishop - - - - 414
See ECCLESIASTICAL LAW.
CLIENT—Compromise of claim by solicitor—No implied authority - - - 122
See SOLICITOR. 2.
COMPANY—Obligation on, to make discovery of documents - - - - 124
See PRACTICE. 3.
COMPENSATION—Market gardeners—"Contract of tenancy" - - - 475
See LANDLORD AND TENANT. 1.
—— Subsidence—Liability of lessee - 165
See MINE.
COMPROMISE—Of claim by solicitor—No implied authority - - - 122
See SOLICITOR. 2.
CONSERVATORS—Of Thames—Rights of owner of shore—Right to take sand - 334
See THAMES.
CONSOLIDATION OF ACTIONS—Libel—Practice—Jurisdiction - - - 159
See LIBEL. 1.
CONTRACT—Breach of, by licensor—Licensee's right of action - - - 445
See LICENCE.
—— Continuous breach of—Servant—Remedies
See MASTER AND SERVANT. 180
—— Custom, inconsistent with—Charterparty 83
See SHIP. 1.
—— Not in writing—Loan—Postponement to other creditors - - - 495
See PARTNERSHIP.
—— Of tenancy—Market gardeners—Compensation - - - - - 475
See LANDLORD AND TENANT. 1.
CONVEYANCE ON SALE—Stamp—Exchange of shares - - - - 423
See REVENUE. 7.
CONVEYANCING AND LAW OF PROPERTY ACT—Forfeiture—Relief of underlessee after - - - - - 218
See LANDLORD AND TENANT. 2.
COPYRIGHT—*Infringement—Assignment—Right of Unregistered Assignee to Sue—Copyright Act*, 1842 (*5 & 6 Vict. c. 45*), *ss.* 13, 24.
The assignee of a copyright under 5 & 6 Vict. c. 45, must be registered before he can maintain an action for its infringement.
Dictum of Cockburn C.J. in *Wood* v. *Boosey*, (1867) L. R. 2 Q. B. 340, not followed. LIVERPOOL GENERAL BROKERS' ASSOCIATION *v.* COMMERCIAL PRESS TELEGRAM BUREAUX Kennedy J. 1
CORPORATION—Charter to—Forfeited recognizance—Amercement - - 502
See REVENUE. 5.
COSTS—District registry—Retaxation by Master of Supreme Court - - - 368
See PRACTICE. 1.
—— Payment into Court as security for—Secured Creditor - - - 516
See BANKRUPTCY. 8.
—— Property subject to incumbrances—Sale by second mortgagee - - - 236
See SOLICITOR. 1.
—— Retainer of solicitor by partnership—Costs incurred after dissolution—Liability 396
See SOLICITOR. 3.
COUNTY COURT—*Practice—High Bailiff—Fees—County Courts Act*, 1888 (*51 & 52 Vict. c. 43*), *ss.* 154, 160.
Where the high bailiff of a county court seizes goods under a warrant of execution, and

COUNTY COURT—*continued.*
subsequently distrains on other goods of the judgment debtor to satisfy a claim for rent made by the landlord under s. 160 of the County Courts Act, 1888, the execution and distress are to be treated as separate proceedings, and the high bailiff is entitled to a separate set of possession fees in respect of each proceeding. *In re* BROSTER. *Ex parte* PRUDDAH - - - Div. Ct. 429

2. —— *Practice — "Statutory Defence" — Notice of Injury—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 4—*County Court Rules*, 1889, *Order x., rr.* 10, 18.

In an action under the Employers' Liability Act, 1880, the defendant cannot rely upon the defence that the notice of injury required by s. 4 of the Act has not been given, unless he has given notice that he intends to rely upon it as a "statutory defence" pursuant to Order x., rr. 10 and 18 of the County Court Rules. CONROY *v.* PEACOCK - - - - Div. Ct. 6

COUNTY COURT RULES, 1889:—
—— ORDER X., RR. 10, 18 - - - 6
See COUNTY COURT. 2.

COVENANT—Not to assign—Breach—Relief of underlessee after forfeiture - 218
See LANDLORD AND TENANT. 2.

—— Not to molest—Separation—Divorce proceedings in foreign country - 547
See HUSBAND AND WIFE.

CREDITOR — Postponement to other — Loan in consideration of share of profits - 495
See PARTNERSHIP.

CROWN—Right of the Crown—Discovery—Production of documents - - 384
See PRACTICE. 4.

CUSTOM—Broker—Liability for premium 93
See INSURANCE, MARINE. 4.

—— Inconsistency with contract—Charterparty
See SHIP. 1. 83

DAMAGE — Remoteness of — Practical joke causing nervous shock - - 57
See ACTION.

—— Subsidence—Liability of lessee - 165
See MINE.

DAMAGES—Action for—Libel—Publication in foreign country - - - 231
See LIBEL. 2.

DEATH—Of judgment debtor—Administration order—Sale by sheriff - - 521
See BANKRUPTCY. 1.

DEATH DUTIES—Estate duty—Property passing on death - - - 47, 102
See REVENUE. 3, 4.

DEBENTURE—Stamp—Principal sum repayable with premium - - - 194
See REVENUE. 8.

DECLARATION OF TRUST—Deposit of share certificates - - - - 19
See BANKRUPTCY. 3.

DELAY — Sale by trustee to partner — Undervalue - - - - - 8
See BANKRUPTCY. 7.

DENTIST—Right to be registered—Qualification
See MEDICAL PRACTITIONER 203

DEPRIVATION—Sentence of—Subsequent deposition by bishop - - - 414
See ECCLESIASTICAL LAW.

DETENTION—Ship—Insufficient depth of water —Charterparty - - - 485
See SHIP. 2.

DISCOVERY—Production of documents 62, 111,
See PRACTICE. 2—6. 124, 188, 384

DISPOSITION—Settlement of personal property —Estate duty—Exemption - 373
See REVENUE. 1.

DISQUALIFICATION—Prosecution by council—Adjudication by ordinary member — Bias - - - - - - 468
See JUSTICES.

DISSOLUTION—Costs incurred after, of partnership—Liability - - - 396
See SOLICITOR. 3.

DISTRICT REGISTRY — Costs — Retaxation by Master of Supreme Court - - 368
See PRACTICE. 1.

DIVORCE—Separation—Covenant not to molest —Divorce proceedings in foreign country
See HUSBAND AND WIFE. 547

DOCK—Ship surveyed while in dock for Lloyd's classification — Apportionment of expenses - - - - 456
See INSURANCE, MARINE. 3.

DOCUMENTS—Production of—Discovery 62, 111, 124, 188, 384
See PRACTICE. 2—6.

DRAIN—Single drain draining several houses—Liability to repair - - - 543
See LOCAL GOVERNMENT. 2.

DUTY—Estate duty - - 47, 102, 373, 535
See REVENUE. 1—4.

—— Public revenue.
See Cases under REVENUE.

ECCLESIASTICAL LAW—*Clergy—Deprivation—Sentence in Consistory Court—Subsequent Deposition by Bishop — Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 8.

Where a clergyman is deprived by sentence of the Consistory Court, and it appears to the bishop of the diocese that the clergyman ought also to be deposed from holy orders, the sentence of deposition, under the Clergy Discipline Act, 1892, s. 8, need not be delivered concurrently with that of deprivation, but may be passed at a subsequent time. REG. *v.* DURHAM (LORD BISHOP OF) - - - - - C. A. 414

EMPLOYERS AND WORKMEN — Continuous breach of contract—Remedies - 180
See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT — Notice of injury—"Statutory defence" - 6
See COUNTY COURT. 2.

ESTATE DUTY—Appointment—Subsequent surrender of life interest - - 535
See REVENUE. 2.

ESTATE DUTY—*continued.*
—— Exemption — Settlement of personal property—"Disposition" - - 373
See REVENUE. 1.
—— Property passing on death - 47, 102
See REVENUE. 3, 4.

EVIDENCE — Betting-house — Person found therein—Arrest—Power to bind over
See GAMING. 1. 527
—— Notes of bankrupt's examination to invalidate deed - - - - 19
See BANKRUPTCY. 3.

EXAMINATION—Notes of bankrupt's, to invalidate deed - - - - 19
See BANKRUPTCY. 3.

EXCHANGE — Shares—Stamp—Conveyance on sale - - - - - 423
See REVENUE. 7.

EXECUTION—Goods seized in—Interpleader—Application of proceeds of sale - 362
See PRACTICE. 7.
—— Notice of bankruptcy petition—Death—Administration order - - 521
See BANKRUPTCY. 1.

FEES—High bailiff—Practice - - 429
See COUNTY COURT.

FINANCE ACT—Estate duty 47, 102, 373, 535
See REVENUE. 1—4.

FINE—Forfeited recognizance—Amercement—Construction of charter to corporation
See REVENUE. 5. 502

FOREIGN COUNTRY—Divorce proceedings in—Covenant not to molest—Separation by agreement - - - - 547
See HUSBAND AND WIFE.
—— Publication of libel in—Action for damages—Jurisdiction - - - 231
See LIBEL. 2.

FORESHORE—Discovery—Production of documents—Right of the Crown - 384
See PRACTICE. 4.
—— Right to fix moorings as incident to navigation - - - - 318
See SEA-SHORE.

FORFEITED RECOGNIZANCE — Fines and amercements—Construction of charter to corporation - - - 502
See REVENUE. 5.

FORFEITURE—Lease — Discovery — Interrogatories - - - - - 111
See PRACTICE. 2.
—— Relief of underlessee after—Breach of covenant - - - - - 218
See LANDLORD AND TENANT. 2.

FRAUDULENT PREFERENCE—Bankruptcy
See BANKRUPTCY. 2, 3. 16, 19

GAMING—*Betting-house—Person found therein—Arrest on Warrant—Power to bind over—Evidence*—33 *Hen.* 8, *c.* 9, *s.* 9—2 *Geo.* 2, *c.* 28, *s.* 9—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *ss.* 3, 6

GAMING—*continued.*
First Schedule—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3, 11.

A person who is found in a betting-house, and is arrested on a warrant, under 16 & 17 Vict. c. 119), s. 11, can be bound over, under 33 Hen. 8, c. 9, s. 9, no more to play, haunt, or exercise, from thenceforth at any gaming-house, notwithstanding that there is no evidence against him, beyond the fact of his having been found in such betting-house. MURPHY *v.* ARROW **Div. Ct. 527**

2. —— *Betting—"Place" used for—Inclosure on Racecourse—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The "place" contemplated by the Betting Act, 1853, ss. 1, 3, is a place which is analogous in its character and use to a betting-house or office.

Adjacent to a racecourse there was an uncovered inclosure of about a quarter of an acre in extent, fenced in by iron rails, to which, when race-meetings were held, the public were admitted by the proprietors of the racecourse on payment of an entrance fee. The number of persons admitted to this inclosure on race-days varied from 500 to 2000, and among them were always a number of professional bookmakers, varying from 100 to 200, who were admitted on the same terms as the general public, and had no interest in or control over the inclosure, or any part thereof, nor any special rights therein. The greater number of the other members of the public who frequented the inclosure went there for the purpose of backing horses with the bookmakers; but a certain number did not bet at all. With a few exceptions the bets made by the bookmakers in the inclosure related to the particular race then about to be run. The bookmakers sometimes required the backer to deposit his stake and sometimes betted on credit. The bookmakers frequenting the inclosure were accompanied by their clerks, who assisted them in their transactions. They did not confine themselves to any fixed spot in the inclosure, nor did they use any apparatus such as a desk, stool, umbrella, or tent, though any particular bookmaker was usually to be found in or near the same part of the inclosure. No betting-lists were exhibited in the inclosure. The practice of the bookmakers was to call out the odds for the purpose of attracting the attention of backers. The businesses of the different bookmakers were rival and competing. It appeared that at the time of the passing of the Betting Act, 1853, such inclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the century:—

Held (by Lord Esher M.R., Lindley L.J., Lopes L.J., A. L. Smith L.J., and Chitty L.J., Rigby L.J. dissenting), that such an inclosure used in such a manner as above mentioned did not come within the provisions of the Betting Act, 1853, ss. 1, 3.

Hawke v. *Dunn*, [1897] 1 Q. B. 579, disapproved of. POWELL *v.* KEMPTON PARK RACECOURSE COMPANY - - - **C. A. 242**

3. —— *Common Gaming House—User of*

GAMING—*continued.*

House or Room for Unlawful Gaming—Gaming Houses Act, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

By s. 4 of the Gaming Houses Act, 1854, "any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein," is made liable on summary conviction to a penalty not exceeding 500*l.*

The defendant, with three friends whom he met, went to his house for the purpose of having a game of cards; after playing whist, they played for money a game called "German Bank," which the jury found to be an unlawful game. There was no evidence that they or any one else had ever played an unlawful game of cards at the defendant's house on any other occasion:—

Held, that the defendant could not be convicted under the above section of using the house or room for the purpose of unlawful gaming being carried on therein:

Held, also, that the question whether a particular game of cards is an unlawful game is a question of law for the judge, and not of fact for the jury. REG. *v.* DAVIES - - C. C. R. 199

GARDENER—Market Gardeners' Compensation Act—"Contract of tenancy" - 475
See LANDLORD AND TENANT. 1.

HIGH BAILIFF—Fees—Practice - - 429
See COUNTY COURT. 1.

HIGHWAY — Steam-roller — Licence—"Used" within the county - - - 482
See LOCOMOTIVE.

HUSBAND AND WIFE—*Separation by Agreement—Covenant not to Molest—Divorce Proceedings in Foreign Country.*

Where a deed of separation between husband and wife contains a covenant by the former not to molest the latter, the taking proceedings in a foreign court to procure a divorce is not of itself, and without evidence of an intention to annoy, a breach of the covenant.

Decision of Wright J., [1897] 2 Q. B. 304, reversed. HUNT *v.* HUNT - - C. A. 547

INCLOSURE—"Place" used for betting—Racecourse - - - - 242
See GAMING. 2.

INCOME TAX—Benefit building society—"Interest of money" lent to borrowing member - - - - 402
See REVENUE. 6.

INCUMBRANCE—Sale by second mortgagee—Costs of vendor's solicitor - - 236
See SOLICITOR. 1.

INDORSEMENT — Writ — Recovery of mesne profits - - - - 66
See PRACTICE. 8.

INFORMATION — Discovery — Production of documents—Right of the Crown 384
See PRACTICE. 4.

INFRINGEMENT—Right of unregistered assignee to sue - - - 1
See COPYRIGHT.

INN - - - - - 33, 37, 308
See LICENSING ACTS. 1—3.

INSPECTION OF DOCUMENTS—Discovery 62, 111, 124, 188, 384
See PRACTICE. 2—6.

INSURANCE, MARINE—*Barratry of Master—Perils of the Sea—Mortgagee of Ship.*

Upon an advance of money to enable the borrower to carry out an arrangement by which he was to become part-owner of a ship, and to be appointed her captain, which arrangement was afterwards carried out, it was agreed that the advance should be secured by a mortgage of his shares in the ship, and that he should cause an insurance to be effected on the ship to cover the mortgagee's interest. An insurance was effected, upon the instructions of the mortgagor and the co-owners of the ship, by the ship's husbands as well in their own names as for and in the name or names of all and every other person or persons to whom the same should appertain in part, or in all, against, among other things, perils of the sea and barratry of the master and mariners. It being alleged by way of defence to an action upon the policy of insurance by the executors of the mortgagee that the ship had been wilfully cast away by her captain, the mortgagor:—

Held, upon the argument of a preliminary question in the action, that, assuming the ship to have been so cast away, the mortgagee was nevertheless entitled to recover upon the policy of insurance in respect of a loss by perils of the sea, if he had nothing to do with the appointment of the mortgagor as captain; or in respect of a loss by barratry of the master, if he had taken part in his appointment.

The decision of Mathew J., [1897] 2 Q. B. 42, affirmed. SMALL *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION - C. A. 311

2. —— *Capture—Notice of Abandonment—Recovery of Ship after Action brought—Total Loss.*

A ship, insured under a policy covering war risks, was, whilst carrying contraband of war destined for one of two belligerent governments, captured by a cruiser belonging to the other. Thereupon the shipowners gave to the underwriters notice of abandonment, which was refused; and shortly afterwards they commenced an action on the policy. Subsequently, the war being at end, the prize court of the captors decreed the ship to be returned to her owners:—

Held, that the return of the ship after the commencement of the action did not disentitle the owners to recover as for a total loss. RUYS *v.* ROYAL EXCHANGE ASSURANCE CORPORATION Collins J. 135

3. —— *Ship Docked for Repairs—Ship Surveyed while in Dock for Lloyd's Classification—Apportionment of Dock Charges and Expenses.*

During a voyage covered by a policy underwritten by the defendants a vessel sustained damage, and was subsequently put into dry dock for the purpose of effecting repairs. The survey of the vessel for the purpose of renewing her classification in Lloyd's Register was not due for some months, but the owners took advantage of her being in dry dock to have the survey made, and her classification was renewed:—

Held, that the dock expenses, so far as they

INSURANCE, MARINE—*continued.*
were common to the repairs and to the survey, ought to be apportioned in equal moieties between the owners and the underwriters.

Marine Insurance Co. v. *China TransPacific Steamship Co.*, (1886) 11 App. Cas. 573, followed. RUABON STEAMSHIP COMPANY *v.* LONDON ASSURANCE - - - - Mathew J. 456

4. —— *Premium—Liability of Broker for—Custom—"Company's Policy."*

The rule of law, founded on mercantile custom, by which the broker, and not the assured, is liable to the underwriter for the premium upon a policy of marine insurance, is not limited to the ordinary form of Lloyd's policy, but extends also to a "company's policy," which contains a promise by the assured to pay the premium. UNIVERSO INSURANCE COMPANY OF MILAN *v.* MERCHANTS MARINE INSURANCE COMPANY C. A. 93

INTEREST—Money lent to borrowing member of benefit society—Income tax - 402
See REVENUE. 6.

INTERPLEADER—Goods seized in execution—Application of proceeds of sale - 362
See PRACTICE. 7.

INTERROGATORIES—Lease—Forfeiture — Discovery - - - - 111
See PRACTICE. 2.

INTOXICATING LIQUORS - - 33, 37, 308
See LICENSING ACTS. 1—3.

JUDGMENT DEBTOR—Death of—Administration order—Sale by sheriff - 521
See BANKRUPTCY. 1.

JURISDICTION—Consolidation of actions—Libel—Practice - - - - 159
See LIBEL. 1.

—— Justices—Continuous breach of contract
See MASTER AND SERVANT. 180

—— Justices—Sewer—Nuisance - - 76
See LONDON. 2.

—— Libel—Publication in foreign country—Action for damages - - 231
See LIBEL. 2.

JUSTICES — *Disqualification — Interest — Probability of Bias—Prosecution by Council of Incorporated Law Society—Adjudication by Ordinary Member of Society—Attorneys and Solicitors Act*, 1874 (37 & 38 *Vict. c.* 68), *s.* 12.

On the hearing of a summons for falsely pretending to be a solicitor, contrary to s. 12 of the Attorneys and Solicitors Act, 1874, a magistrate, who was a practising solicitor, and an ordinary member of the Incorporated Law Society, sat and adjudicated. The proceedings were taken by the council of the Incorporated Law Society, who alone had power to direct prosecutions, ordinary members having no control over the proceedings of the society.

On the argument of an order nisi for a certiorari to quash the conviction:—

Held, that the circumstances did not shew any probability of bias on the part of the magistrate, that he was not disqualified by his membership of the Incorporated Law Society, either as having

JUSTICES—*continued.*
a pecuniary interest in the proceedings, or as being a prosecutor, and therefore he was justified in adjudicating. REG. *v.* BURTON. *Ex parte* YOUNG - - - - Div. Ct. 468

—— Jurisdiction—Continuous breach of contract.
See MASTER AND SERVANT. 180

—— Jurisdiction—Sewer—Nuisance - 76
See LONDON. 2.

JUSTIFICATION — Bicycle — Arrest of rider riding without proper light - 452
See BICYCLE.

LANDLORD AND TENANT — *Compensation—Tenancy from Year to Year—"Contract of Tenancy"—Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *s.* 4—*Agricultural Holdings* (*England*) *Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 61.

By an agreement dated October 22, 1886, the owner of a piece of land let the same to a tenant from September 29, 1886, at the rent of 19*l.* 12*s.* a year, payable quarterly on the four usual quarter-days for payment of rent in every year, and the tenant agreed to pay the said rent at the times aforesaid, and to use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner, and it was agreed that the tenancy might be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case might be, on any day of the year. The land so let was used by the tenant as a market garden. In October, 1896, the landlord gave the tenant notice to quit. The tenant claimed compensation for improvements under s. 4 of the Market Gardeners' Compensation Act, 1895, which is to be read as part of the Agricultural Holdings (England) Act, 1883:—

Held, that the agreement created a tenancy from year to year, and therefore the tenant came within s. 4 of the Market Gardeners' Compensation Act, 1895, as having held under a "contract of tenancy" as defined by s. 61 of the Agricultural Holdings (England) Act, 1883.

Doe v. *Grafton*, (1852) 18 Q. B. 496, commented on. KING *v.* EVERSFIELD - C. A. 475

2. —— *Forfeiture—Relief of Underlessee after—Breach of Covenant not to Assign—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

The Court has jurisdiction under the Conveyancing and Law of Property Act, 1892, to relieve an underlessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence, and therefore could not be relieved against in favour of the lessee under the Conveyancing and Law of Property Act, 1881, with which the latter Act is to be read together. This jurisdiction, however, will be exercised with caution and sparingly, and the underlessee asking for its exercise must shew that he is blameless, and has taken all precautions which a reasonably cautious and careful person would use.

Where, therefore, L. purchased an underlease

LANDLORD AND TENANT—*continued.*
under a contract which did not give him a right to call for the title of the original lessee, who was bound by covenant not to assign or underlet without licence, and he purchased with the intention of laying out a considerable sum upon the property:—

Held, that L. had been guilty of negligence in entering into such a contract that he was precluded from properly investigating the title, and that relief against a forfeiture by the original lessee for breach of the covenant ought not to be granted to him. IMRAY *v.* OAKSHETTE **C. A. 218**

—— Subsidence—Liability of lessee—Compensation clause - - - - **165**
See MINE.

LEASE - - - - - **218, 475**
See LANDLORD AND TENANT. 1, 2.

—— Forfeiture—Discovery—Interrogatories **111**
See PRACTICE. 2.

LIABILITY—To repair—Single drain draining several houses - - - **543**
See LOCAL GOVERNMENT. 2.

LIBEL—*Consolidation of Actions — Practice — Jurisdiction—Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64), *s.* 5.

There is jurisdiction under the Law of Libel Amendment Act, 1888, s. 5, to make an order consolidating actions of libel brought by the same person against several defendants in respect of the same or substantially the same libel before the delivery of defences in the actions. STONE *v.* PRESS ASSOCIATION - - - **C. A. 159**

2. —— *Publication in a Foreign Country—Alleged Libel—Action for Damages—Jurisdiction—Procedure—Pleading.*

An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country.

The rule enunciated in *Phillips* v. *Eyre*, (1870) L. R. 6 Q. B. 1, and *The M. Moxham*, (1876) 1 P. D. 107, applied. MACHADO *v.* FONTES **C. A. 231**

—— Newspaper—Inspection of original manuscript - - - - **188**
See PRACTICE.

LICENCE—*Revocation—Breach of Contract by Licensor—Licensee's Right of Action—Posting Advertisements on Hoarding.*

Plaintiff and defendant agreed orally that defendant should let his wall to plaintiff, for bill-posting, at 2*l.* 10*s.* a year, plaintiff to erect a hoarding, on which the bills were to be posted. Plaintiff erected the hoarding, posted bills, and made several payments. Defendant gave notice to plaintiff that the hoarding must be removed, and nearly a month later defendant took it down.

In an action to recover damages for breach of contract:—

Held, that, although the permission to post bills was a licence, and therefore, not being by deed, was revocable, the action was maintainable for breach of contract, and therefore plaintiff was wrongly nonsuited.

Wood v. *Leadbitter*, (1845) 13 M. & W. 838, distinguished. KERRISON *v.* SMITH **Div. Ct. 445**

—— Steam-roller—"Used" within the county
See LOCOMOTIVE. **482**

LICENSING ACTS—*Licence — "Off-Licence" — Order sanctioning Removal—Notice of Application—Certiorari—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

The provisions of s. 50 of the Licensing Act, 1872, requiring notice to be given of an application for an order sanctioning the removal of a licence, apply to licences to sell liquor for consumption off the premises.

Therefore, where justices made an order sanctioning the removal of an off-licence from one house to another, without the notice required by that section having been given:—

Held, that the order was invalid, and a certiorari to quash it granted. REG. *v.* THORNTON. *Ex parte* LACON & Co. - **Div. Ct. 308**

2. —— *Offences — Being found Drunk on Licensed Premises after Closing Hours—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.

A customer, not being an inmate or lodger, who is found drunk in a public-house after the closing hour and after the premises are in fact closed, may be convicted under s. 12 of the Licensing Act, 1872, of being found drunk on licensed premises. Licensed premises do not cease to be licensed premises for the purposes of that section by reason of the fact that after the hour of closing they are no longer open to the public.

Lester v. *Torrens*, (1877) 2 Q. B. D. 403, considered. REG. *v.* PELLY - - **Div. Ct. 33**

3. —— *Offences—Selling Intoxicating Liquors without Licence—Sale by Holder of Licence after Temporary Authority granted to Another—Ale House Act*, 1842 (5 & 6 *Vict. c.* 44), *s.* 1; *Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The respondent, being the duly licensed keeper of a beerhouse, remained in possession of the premises and sold beer thereon after a temporary authority to carry on the business on the same premises had been granted, under 5 & 6 Vict. c. 44, s. 1, to another person in contemplation of the transfer of the licence and the possession of the premises to him:—

Held, that the respondent was not liable to be convicted under s. 3 of the Licensing Act, 1872, of the offence of selling intoxicating liquors without a licence. ANDREWS *v.* DENTON **Div. Ct. 37**

LIMITATIONS, STATUTE OF—*Mortgage*—"*Person claiming under a Mortgage*"—*Possession adverse to Mortgagor—Real Property Limitation Act*, 1837 (7 *Will. 4 and 1 Vict. c.* 28).

In 1886 the owner of one undivided moiety of premises, which had been during the previous eleven years in the sole possession of the owners of the other moiety, mortgaged his moiety; and in 1890, the premises having in the meantime continued and still continuing to be in the sole possession of the owners of the other moiety, he executed a conveyance of his moiety, subject to

LIMITATIONS, STATUTE OF—*continued.*
the mortgage, to the plaintiff, who subsequently paid off the mortgage:—

Held, that the plaintiff did not, on paying off the mortgage, become a "person claiming under a mortgage" within the meaning of the Real Property Limitation Act, 1837, which, as modified by the Real Property Limitation Act, 1874, s. 9, gives such a person a period of twelve years from the last payment of any part of the principal money or interest secured by the mortgage for bringing an action to recover the land:—

Held, also, that the Real Property Limitation Act, 1837, does not confer a new right of entry on the mortgagee where at the date of the mortgage a person is in possession adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor.

Doe v. *Massey*, (1851) 17 Q. B. 373, distinguished and considered. THORNTON *v.* FRANCE **C. A. 143**

LLOYD'S CLASSIFICATION — Ship surveyed while in dock for—Apportionment of expenses - - - - **456**
See INSURANCE, MARINE. 3.

LOAN—In consideration of share of profits—Postponement to other creditors - **495**
See PARTNERSHIP.

LOCAL GOVERNMENT—*Cesspools in connection with Buildings—By-Laws — Local Authority—Powers—Rural Sanitary Authority—Application of By-law to old Buildings—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 23.

The power of a rural sanitary authority under s. 157 of the Public Health Act, 1875, as amended and extended to rural sanitary authorities by s. 23 of the Public Health Acts Amendment Act, 1890, to make by-laws with respect to (inter alia) cesspools in connection with buildings extends to old buildings in existence before the making of the by-law as well as to new buildings.

A by-law of a rural sanitary authority providing that "every person who shall construct a cesspool in connection with a building shall construct such cesspool at a distance of fifty feet at least from a dwelling-house" is not unreasonable merely by reason of the fact that in a particular case it is not possible to construct a cesspool at the prescribed distance. SIMMONS *v.* MALLING RURAL DISTRICT COUNCIL - - **Div. Ct. 433**

2. —— *Drain or Sewer—Single Drain draining several Houses—Liability to Repair—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe passing through private property received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority, who had adopted the Public Health Acts Amendment Act, 1890, took proceedings against the owners of the said houses under s. 41 of the Public Health Act, 1875:—

Held, following *Bradford* v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, and disapproving

LOCAL GOVERNMENT—*continued.*
Hill v. *Hair*, [1895] 1 Q. B. 906, that the pipe in question was a single private drain within the meaning of s. 19 of the Act of 1890. SEAL *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL **Div. Ct. 543**

3. —— *Water-closets — Local Authority — Powers—Notice to abate Nuisance—Power to require sufficient Water-closet to be provided—General Order requiring Adoption of particular System —Invalidity—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

Sect. 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular water-closet system shall be adopted; but they are bound to exercise their discretion in each particular case, and therefore such a resolution is invalid, and invalidates proceedings taken in pursuance of it.

Tinkler v. *Wandsworth District Board of Works*, (1858) 2 De G. & J. 261, followed. WOOD *v.* WIDNES CORPORATION - - **Div. Ct. 357**

—— Bicycle—Arrest of rider riding without proper light—Justification - **452**
See BICYCLE.

LOCOMOTIVE—*Passing through County—"Used" within the County—Licence—Steam-roller—Highways and Locomotives Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 32.

The Highways and Locomotives Act, 1878, provides by s. 32 that "A county authority may . . . . make . . . . by-laws for granting annual licences to locomotives used within their county." And by a by-law made by the London County Council under that section it was provided that "No locomotive shall be used on any highway within the county of London until an annual licence for the use of the same shall have been obtained from the council by the owner thereof":—

Held, that a steam-roller which was not at the time being employed in road-making, but was merely passing through the county to a destination outside, was being "used within the county" within the meaning of the section and the by-law. LONDON COUNTY COUNCIL *v.* WOOD **Div. Ct. 482**

LONDON—*Nuisance— Committee — Approval of acts of by Vestry—Ratification—Act made Criminal by Relation—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 58.

By s. 58 of the Metropolis Management Act, 1855, "It shall be lawful for . . . . any (metropolitan) vestry to appoint a committee . . . . for any purposes which in the discretion of the . . . . vestry would be better regulated and managed by means of such committee . . . . Provided always that the acts of every such committee shall be submitted to the general body of the . . . . vestry appointing such committee for their approval." A committee, appointed by a metropolitan vestry under this section for the purpose (inter alia) of executing the Metropolis Manage-

LONDON—*continued.*
ment Acts, so far as they related to the public health of the parish, being informed by the sanitary inspector that a nuisance existed upon certain premises endangering the health of the inhabitants, directed the inspector to serve notice upon the owner of the premises under the said Acts requiring him to abate the nuisance, and in default to take proceedings. The inspector, in pursuance of such direction, served the required notice, and, upon the owner failing to comply with it, laid an information against him for penalties under the said Acts, and a summons was issued. After the issue of the summons and before the hearing of the information, the vestry by resolution approved the acts of the committee in causing the notice to be served and the information to be laid :—

Held, that the approval of the vestry, although given after the service of the notice and the issue of the summons, was sufficient, and that the owner was liable to be convicted. FIRTH *v.* STAINES - - - - **Div. Ct. 70**

2. —— *Sewer—Nuisance—Jurisdiction of Justices—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 2, *sub-s.* 1 (*b*).

By the Public Health (London) Act, 1891, s. 2, sub-s. 1 (*b*), for the purposes of the Act, any watercourse or drain, so foul, or in such a state, as to be a nuisance or injurious or dangerous to health, is a nuisance liable to be dealt with summarily under the Act :—

Held, that this provision does not apply to public sewers, and therefore justices have no jurisdiction to make a summary order on the London County Council in respect of a main sewer, vested in the council, and forming part of the main drainage system of London. FULHAM VESTRY *v.* LONDON COUNTY COUNCIL **Div. Ct. 76**

MANUSCRIPT — Inspection of original — Discovery—Libel in newspaper - **188**
See PRACTICE. 6.

MARINE INSURANCE - **93, 135, 311, 456**
See INSURANCE, MARINE. 1—4.

MARKET GARDENER—Compensation—"Contract of tenancy" - - - **475**
See LANDLORD AND TENANT. 1.

MARRIAGE SETTLEMENT—Estate duty—Appointment—Subsequent surrender of life interest - - - - **535**
See REVENUE. 2.

MARRIED WOMAN—Separation—Covenant not to molest—Divorce proceedings in foreign country - - - - **547**
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Remedies—Jurisdiction of Justices—Proceedings against Servant—Continuous Breach of Contract—Further Proceedings—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.

By the Employers and Workmen Act, 1875, s. 4, a dispute between an employer and a workman may be determined by a court of summary jurisdiction, provided that the Court shall not exercise jurisdiction where the amount claimed exceeds 10*l.*

On October 22 the respondents agreed to employ the appellant, and he agreed to serve them, for fifty-two weeks, at specified weekly wages. On November 16 the appellant left his work, and did not return.

On December 16 the respondents took proceedings, under the Act, in a court of summary jurisdiction, against the appellant, and recovered 10*l.* damages for his absence from November 16 to 28. Afterwards the respondents took further proceedings, in the same court, to recover another 10*l.* for the appellant's absence from November 30 to December 12.

On a case stated :—

Held, that the jurisdiction of the Court, being limited to 10*l.*, was exhausted by the judgment in the first case, and therefore the respondents were not entitled to recover in the second case. JAMES *v.* EVANS & Co. - - **Div. Ct. 180**

—— Employers' Liability Act—Notice of injury
See COUNTY COURT. 2. **6**

MEDICAL PRACTITIONER—*Dentist—Right to be Registered — Qualification — Articled Pupil at passing of Act—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *ss.* 6 (*c*), 7, 37.

By s. 6 (*c*) of the Dentists Act, 1878, any person at the passing of the Act bonâ fide engaged in the practice of dentistry is entitled to be registered under the Act. By the proviso in s. 7 a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless, before August 1, 1879, he makes a declaration in the form in the schedule to the Act, or to the like effect. The form declares that the applicant was bonâ fide engaged in the practice of dentistry at the date of the passing of the Act. By s. 37 a person who has been articled as a pupil shall, if his articles expire before January 1, 1880, be entitled to be registered as though he had been in bonâ fide practice before the passing of the Act.

A person who was, at the time of the passing of the Act, articled as a pupil within the meaning of s. 37, applied to have his name placed upon the Dentists' Register. He had not made the declaration required by s. 7 :—

Held, affirming the judgment of the Queen's Bench Division, [1897] 1 Q. B. 764, that the proviso in s. 7 applies to persons whose qualification is given by s. 37, and that, therefore, the applicant, not having made the declaration, was not entitled to be registered. REG. *v.* MEDICAL COUNCIL - - - - - **C. A. 203**

MERCHANT SHIPPING ACT, 1894 - **327**
See SHIP. 3.

MESNE PROFITS — Recovery of — Special indorsement on writ - - - **66**
See PRACTICE. 8.

METROPOLIS - - - - **70, 76**
See LONDON. 1, 2.

METROPOLIS MANAGEMENT ACT—Nuisance —Approval of acts of committee by vestry
See LONDON. 1. **70**

MINE—*Lease—Compensation Clause—Subsidence—Injury to Land and Buildings—Liability of Lessee—Damage caused by act of Lessee's Predecessor in Title.*

Mines were granted by deed, with power to the grantee and his assigns to work, making reasonable compensation for all damage occasioned to the surface of the lands, or to buildings thereon, by the exercise of the powers by the indenture granted:—

Held, following *Davis* v. *Treharne*, (1881) 6 App. Cas. 460, that damage by subsidence was not covered by the compensation clause, and therefore the assigns of the grantee were liable to an action to recover damages for injury done to the surface of the land by subsidence caused by working the mines.

A lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease.

Therefore, where the plaintiffs' buildings, erected more than twenty years before action, on land, the mines under which were worked by the defendants under a lease, were injured, during the currency of the lease, and within six years before action, by subsidence caused, not by the acts of the defendants, but by the acts of their predecessor in title, done prior to the date of the lease:—

Held, that the defendants were not liable. GREENWELL *v.* LOW BEECHBURN COAL COMPANY Bruce J. 165

MOLESTATION — Separation — Covenant — Divorce proceedings in foreign country 547
See HUSBAND AND WIFE.

MOORINGS—Right to fix, as incident to navigation—Foreshore - - - 318
See SEASHORE.

MORTGAGE—Mortgagee of ship—Barratry of master—Perils of the sea - - 311
See INSURANCE, MARINE. 1.

—— Of settled property—Estate duty - 47
See REVENUE.

—— "Person claiming under a mortgage"—Possession adverse to mortgagor - 143
See LIMITATIONS, STATUTE OF.

—— Sale by second mortgagee—Costs of vendor's solicitor - - - - 236
See SOLICITOR. 1.

NERVOUS SHOCK—Practical joke causing—Remoteness of damage - - 57
See ACTION.

NEWSPAPER—Libel in—Inspection of original manuscript - - - - 188
See PRACTICE. 6.

NOTICE—Licence—Application for order sanctioning removal - - - 308
See LICENSING ACTS. 1.

NOTICE—*continued.*

—— Of injury—Employers' Liability Act 6
See COUNTY COURT. 2.

—— To abate nuisance—Power to require a sufficient water-closet - - 357
See LOCAL GOVERNMENT. 3.

NUISANCE—Approval of acts of committee by vestry—Ratification - - 70
See LONDON. 1.

—— Notice to abate—Power to require a sufficient water-closet - - 357
See LOCAL GOVERNMENT. 3.

—— Sewer—Jurisdiction of justices - 76
See LONDON. 2.

OWNERSHIP—Reputed ownership—Bill of sale
See BANKRUPTCY. 6. 461

PARTNERSHIP—*Loan in consideration of Share of Profits—Contract not in Writing—Postponement to other Creditors in Bankruptcy—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-s.* 3 (*d*), *s.* 3.

The rights of a person who advances money by way of loan to another engaged in business, on a contract that the lender shall share in the profits of the business, are postponed under s. 3 of the Partnership Act, 1890, in case the person to whom the money has been advanced is adjudged a bankrupt, until the claims of the other creditors have been satisfied, whether the contract to advance the money be oral or in writing. *In re* FORT. *Ex parte* SCHOFIELD - C. A. 495

—— Costs of action—Dormant partners—Liability - - - - - 396
See SOLICITOR. 3.

—— Sale by trustee to partner of member of committee of inspection—Undervalue 8
See BANKRUPTCY. 7.

PAYMENT INTO COURT—With denial of liability—Security for costs - - 516
See BANKRUPTCY. 8.

PENALTY—For not substituting road for road interfered with - - - 239
See RAILWAY.

PENDING ACTION—Payment into court with denial of liability—Bankruptcy before trial - - - - - 516
See BANKRUPTCY. 8.

PLACE—Betting—Inclosure on racecourse 242
See GAMING. 2.

POSTPONEMENT—To other creditors—Loan in consideration of share of profits - 495
See PARTNERSHIP.

PRACTICE—*Costs—Taxation—District Registry—Review of Taxation—Retaxation by Master of Supreme Court—Rules of Supreme Court, Order XXXV., r. 4; Order LXV., r. 27, sub-r. 41.*

In a case in which final judgment had been entered in a district registry, and the taxation of costs had commenced before, and objections had been carried in and dealt with by the district registrar, it was *held*, that, under Order XXXV., r. 4, and Order LXV., r. 27, sub-r. 41, a judge had

PRACTICE—*continued.*
jurisdiction in the exercise of his discretion to order that the items referred to in the objections should be referred to a taxing-master of the Supreme Court for retaxation. STEVENS *v.* GRIFFIN C. A. 368

2. —— *Discovery—Action for Forfeiture of Lease—Affidavit of Documents—Interrogatories—Order* XXXI., *rr.* 1, 2, 12.

In an action to enforce a forfeiture of a lease for breach of covenant the Court will not grant discovery of documents or leave to administer interrogatories for the purpose of establishing the forfeiture.

Pye v. *Butterfield*, (1864) 5 B. & S. 829, approved of.

Seaward v. *Dennington*, (1896) 44 W. R. 696, overruled. MEXBOROUGH (EARL OF) *v.* WHITWOOD URBAN DISTRICT COUNCIL - - C. A. 111

3. —— *Discovery — Documents — Action by Shareholder of Company—Allegation of Conspiracy to Defraud Company — Company made Defendants—Obligation on Company to make Discovery of Documents—Objection by Defendant that Discovery may tend to Criminate him—Objection must be taken on Oath—Order* XXXI., *r.* 12.

An action was brought by a shareholder in a company, on behalf of himself and other the shareholders of the company, against the directors and another defendant alleging a conspiracy to defraud the company, and that they had been defrauded thereby, and claiming damages to be paid to the company. The company were made defendants:—

Held, that the company were an "other party" to the action within the meaning of Order XXXI., r. 12, and could be called on to make discovery of documents:—

Held, also, that an objection by a defendant that the discovery of documents may tend to criminate him can only be taken to the production of the documents alleged to have that effect, and not to the order for discovery, and must be taken upon oath. SPOKES *v.* GROSVENOR AND WEST END RAILWAY TERMINUS HOTEL COMPANY C. A. 124

4. —— *Discovery — Information—Production of Documents—Right of the Crown—Ownership of Foreshore and Bed of River—Crown Suits, &c., Act*, 1865 (28 *&* 29 *Vict. c.* 104), *ss.* 13, 14, 15, 16 *—Rules of Court for Regulating the Procedure and Practice in Suits by English information* (*Easter Term*, 1866), *rr.* 4 (1), 5 (5).

By information in the Queen's Bench Division (Queen's Remembrancer's side) against a corporation, the Attorney-General on behalf of the Crown claimed a declaration that the foreshore and bed of a river within certain limits belonged to the Crown. The defendants by their answer claimed to be owners of the same foreshore and bed, within the limits of a port and including the part claimed by the Crown, and to be also conservators of the river; and they set out a list of documents relating to the part claimed by the Crown, and alleged that they had no other relevant documents. The Crown did not except to the answer within the time limited by the Rules of Easter Term, 1866:—

Held, that the Crown had the same right of discovery against the corporation as a subject had against a subject in an ordinary action, and that the omission to except to the answer was no bar to such right:

And *held* further, that the Crown was entitled to discovery not only of the documents relating to the parts of the river claimed by the information, but also of anything which might tend to shew that the defendants were not absolute owners of the foreshore and bed of the river to the extent which they claimed to be, including all their acts of ownership as conservators or otherwise, and the documents relating thereto.

The principles of *Attorney-General* v. *Corporation of London*, (1850) 2 Mac. & G. 247, and *Attorney-General* v. *Emerson*, (1882) 10 Q. B. D. 191, applied. ATTORNEY-GENERAL *v.* NEWCASTLE-UPON-TYNE CORPORATION - - C. A. 384

5. —— *Discovery — Inspection — Documents forming part of Defendants' Case only—Affidavit conclusive.*

In an action for an alleged misrepresentation in the prospectus of a company the statement complained of was that 12,500 persons had enrolled themselves as annual subscribers to the company. In an affidavit of documents the defendants stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, but that they objected to produce them on the ground that they were part of the evidence supporting the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants:—

Held, that the plaintiff was not entitled to inspection of the applications. FRANKENSTEIN *v.* GAVIN'S HOUSE-TO-HOUSE CYCLE CLEANING AND INSURANCE COMPANY - - - C. A. 62

6. —— *Discovery—Inspection of Documents—Libel in Newspaper—Original Manuscript—Discretion—Order* XXXI., *r.* 18.

In an action against the proprietors of a newspaper for a libel published therein the defendants, who had admitted the publication of the libel and pleaded an apology and payment into court, stated in an affidavit of documents made by them that they had in their possession a manuscript which they objected to produce on the ground that it was the original contribution to them, and that which was published by them as admitted in their defence:—

Held, that an order ought not to be made for inspection by the plaintiff of the manuscript.

Hennessy v. *Wright*, (1888) 24 Q. B. D. 445, followed.

Bustros v. *White*, (1876) 1 Q. B. D. 423, considered. HOPE *v.* BRASH - - C. A. 188

7. —— *Interpleader—Goods seized in Execution—Order for Sale—Application of Proceeds of Sale—"In such manner and upon such terms as may be just"—Rules of Supreme Court, Order* LVII., *r.* 12.

By Order LVII., r. 12, "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for

PRACTICE—*continued.*
debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just."

A sheriff seized goods in execution under a judgment of the High Court. The goods were claimed by the grantee of a bill of sale, as security for a debt due to him from the judgment debtor. The debt was payable, with interest at a high rate per cent., by instalments extending over a period of several months, the greater part of which had not expired. The sheriff interpleaded, and a judge at chambers, on the application of the judgment creditor, under Order LVII., r. 12, ordered the sale of the goods, and the payment to the claimant of the balance of his debt with interest at the agreed rate, but only up to the time of such payment. On appeal:—

Held, by Lord Esher M.R. and A. L. Smith L.J., Rigby L.J. dissenting, that the power of the judge to make an order as to the application of the proceeds of the sale upon such terms as may be just was not limited by the practice of the Courts of Equity in suits for redemption, that the judge had power to make the order, and that the order was just. FORSTER *v.* CLOWSER - - - - C. A. 362

8. —— *Writ — Special Indorsement on — Recovery of Land and Mesne Profits—Time to which Mesne Profits can be given—Order III., r. 6 —Order XIV., r. 1—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 214.

The plaintiffs issued a writ indorsed with a claim for possession of hereditaments at S., of which particulars were given, with a statement that the defendant had been tenant to the plaintiffs, and that his tenancy had expired by notice on a given day, and the plaintiffs claimed "possession and 80*l.* for mesne profits." They then applied under Order XIV., r. 1, for liberty to sign final judgment for possession and the 80*l.* claimed for mesne profits. By affidavit in support of the application, the 80*l.* was claimed as double value for six months on account of the defendant having refused to deliver up possession. On the hearing of the application Kennedy J. gave liberty to the plaintiffs to sign final judgment for possession, "and for mesne profits to be calculated up to the date of the plaintiffs obtaining possession":—

Held, on appeal, that this order was right, for that, whether double value could be recovered or not, the writ was not vitiated by the plaintiffs claiming it by affidavit, and that the judge was not confined to giving mesne profits up to the time of the order, and was not bound to put the plaintiffs to a second action to recover mesne profits between the time of judgment and the time of recovering possession. SOUTHPORT TRAMWAYS COMPANY *v.* GANDY - - C. A. 66

—— Consolidation of actions—Libel - 159
See LIBEL. 1.

—— High bailiff—Fees - - - 429
See COUNTY COURT. 1.

PREMIUM—Liability for—Broker—Custom 93
See INSURANCE, MARINE. 4.

PREMIUM—*continued.*
—— Principal sum repayable with—Debenture —Stamp - - - - 194
See REVENUE. 8.

PRESUMPTION — Legal origin — Immemorial user to fix moorings - - 318
See SEASHORE.

PRODUCTION OF DOCUMENTS—Discovery 62, 111, 124, 188, 384
See PRACTICE. 2—6.

PROFITS—Loan in consideration of share of—Postponement to other creditors - 495
See PARTNERSHIP.

PROOF—Alimony—Arrears accrued due before receiving order - - - 439
See BANKRUPTCY. 5.

—— Onus of—Fraudulent preference - 16
See BANKRUPTCY. 2.

PUBLIC HEALTH (LONDON) ACT—Sewer—Nuisance—Jurisdiction of justices 76
See LONDON. 2.

PUBLIC HEALTH ACTS - 357, 433, 543
See LOCAL GOVERNMENT. 1—3.

PUBLICATION — In foreign country—Libel—Action for damages - - 231
See LIBEL. 2.

PUBLIC-HOUSE - - - 33, 37, 308
See LICENSING ACTS. 1—3.

QUALIFICATION—Dentist—Right to be registered - - - - - 203
See MEDICAL PRACTITIONER.

RACECOURSE—Inclosure on—"Place" used for betting - - - - 242
See GAMING. 2.

RAILWAY—*Penalty for not substituting Road for Road interfered with—Road belonging to Different Owners—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By s. 54 of the Railways Clauses Act, 1845, a railway company who neglect to substitute a sufficient road for any road obstructed by them in the exercise of their powers are liable to a penalty, which in the case of a private road is to be paid "to the owner thereof":—

Held, that the section is applicable to a case in which part of the width of the obstructed road is owned by one person and part by another.

Semble, that the company are liable for the entire penalty to every person who owns any part of the obstructed road. LLEWELLYN *v.* VALE OF GLAMORGAN RAILWAY COMPANY Wright J. 239

RATE—Water—Annual value—Assessment 209
See WATERWORKS.

REAL PROPERTY LIMITATION ACT, 1837—Possession adverse to mortgagor - 143
See LIMITATIONS, STATUTE OF.

RECEIVING ORDER—Arrears of alimony accrued due before—Proof - - - 439
See BANKRUPTCY. 5.

RECOGNIZANCE — Forfeited — Amercement—Construction of charter to corporation 502
See REVENUE. 5.

RECOVERY OF LAND—Mesne profits—Special indorsement on writ - - 66
See PRACTICE. 8.

REGISTRATION—Dentist—Qualification 203
See MEDICAL PRACTITIONER.

—— Right of unregistered assignee to sue 1
See COPYRIGHT.

REGISTRY (DISTRICT)—Costs—Retaxation by Master of Supreme Court - - 368
See PRACTICE.

REMOTENESS — Of damage — Practical joke causing nervous shock - - 57
See ACTION.

REMOVAL—Application for order sanctioning—Licence - - - - 308
See LICENSING ACTS. 1.

REPAIRS — Liability — Single drain draining several houses - - - 543
See LOCAL GOVERNMENT. 2.

REPUTED OWNERSHIP—Bill of sale - 461
See BANKRUPTCY. 6.

RETAINER—By partnership — Costs incurred after dissolution—Liability - 396
See SOLICITOR. 3.

RETAXATION—Costs—Master of Supreme Court
See PRACTICE. 1. 368

REVENUE—*Estate Duty — Exemption — Settlement of Personal Property — "Disposition"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 21, *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property" probate duty (among other specified duties) "has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." Under a marriage settlement personal property belonging to the wife became vested in trustees upon trust for the wife for life, and, after her death, if her husband should survive her, upon trust for the husband for life, and, after the death of the survivor of them, upon trust for such person or persons as the wife should by deed or will appoint. The wife died in the lifetime of her husband before the commencement of the Finance Act, 1894, having by her will appointed the property in favour of certain beneficiaries, and probate duty was thereupon paid by her executors in respect of the value of the property so appointed after deducting the value of the husband's life interest. The husband died after the commencement of the Act:—

Held (affirming the decision of Vaughan Williams and Wright JJ., [1897] 1 Q. B. 722), that the settlement and will together constituted a "disposition" by which the property was settled within the meaning of s. 21, sub-s. 1, and therefore that estate duty was not payable on the husband's death in respect of the value upon which probate duty had been paid.

By Rigby L.J.: *Semble*, estate duty was not payable on the amount of the value of the husband's life interest, probate duty having been paid on the whole of the property. ATTORNEY-GENERAL *v.* DODINGTON - - **C. A. 373**

2. —— *Estate Duty—Marriage Settlement — Appointment by Tenant for Life subject to Life Interest—Subsequent Surrender of Life Interest in favour of Remainderman—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2, *sub-s.* 1 (*b*).

By s. 1 of the Finance Act, 1894, estate duty is made payable on the principal value of all property, real or personal, settled or not settled, which passes on the death of any person dying after the commencement of that part of the Act. By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased includes "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

The tenant for life of certain property comprised in a marriage settlement with a power of appointment appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest in the settled property to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son:—

Held, that upon the death of the tenant for life estate duty became payable in respect of the property appointed to the son as being property passing on her death within the meaning of the Finance Act, 1894. ATTORNEY-GENERAL *v.* BEECH - - - - **Div. Ct. 535**

3. —— *Estate Duty — Mortgage of Settled Property—Value of Property Passing on Death of Tenant for Life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 1 (*a*), *sub-s.* 7 (*b*).

Property being settled upon a father for life with remainder to his son in tail, the father and son joined in executing a disentailing assurance whereby they settled the property to such uses as they should jointly appoint, and subject thereto in the same manner as it was theretofore settled. The father and son jointly borrowed money on mortgage of the settled property, and under their joint power appointed the property to the mortgagees. The money so borrowed was applied partly to the use of the father and partly to the use of the son. In 1895, while the mortgage was still subsisting, the father died, and the son succeeded to the equity of redemption of the settled property:—

Held, that for the purposes of computing the value of the property passing on the death of the father and liable to estate duty under the Finance Act, 1894, there must be deducted from the gross value of the settled property the whole amount of the mortgage debt, including the portion of it applied to the use of the son. *In re* EARL COWLEY'S ESTATE - - - **Div. Ct. 47**

4. —— *Estate Duty — Property Passing on Death—Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5.

By ss. 1 and 2 of the Finance Act, 1894, estate duty is imposed upon property, real or personal, settled or not settled, "which passes on the

REVENUE—*continued.*

death" of every person dying after the commencement of the Act. By s. 5, sub-s. 3, where the interest of any person under a settlement fails before it becomes an estate in possession, "and subsequent limitations under the settlement continue to subsist," the property shall not be deemed to pass on his death.

By a marriage settlement personal property belonging to the wife was settled upon trusts to pay the income to her during the joint lives of her husband and herself, and after the death of such one of them as should first die, to pay the income to the survivor during his or her life, and if the wife should survive her husband, and there should be no children of the marriage, then in trust for her absolutely. There were no children of the marriage. The wife survived her husband, who died after the commencement of the Act:—

Held, that on his death "subsequent limitations under the settlement continued to subsist" within the meaning of s. 5, sub-s. 3, so that estate duty was not payable. ATTORNEY-GENERAL *v.* WOOD - - - - - Div. Ct. 102

5. —— *Forfeited Recognizance—Fines and Amercements—Construction of Charter to Corporation.*

By a charter of Henry IV. the Crown granted to the corporation of Nottingham "all fines for trespasses and other offences whatsoever, and also fines for licence to agree, and all amercements, ransoms and forfeited issues, forfeitures year day waste and estrepement."

By a charter of Henry VI. the Crown granted to the corporation "all issues fines and amercements from whatsoever pledges and mainpernors" of persons dwelling in the borough:—

Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of felony or misdemeanour pass to the corporation. *In re* NOTTINGHAM CORPORATION Div. Ct. 502

6. —— *Income Tax—Benefit Building Society—Money Lent to Borrowing Member—"Interest of Money" so Lent—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A benefit building society lent money to borrowing members at a fixed rate of interest, and took from them a security on their property. The repayment of the loans was by weekly payments of a fixed sum, in respect of principal and interest, the proportion of interest to principal in each payment decreasing as time went on, and the principal remaining due decreased. No deduction was allowed to be made by the borrower in respect of income tax. The society were assessed to income tax under Sched. D. on the interest they received, as being interest of money within s. 2 of the Income Tax Act, 1853. On a case stated:—

Held, that the expression "interest of money" in s. 2 of the Income Tax Act, 1853, is not restricted to annual interest, and that the interest received by the society was not in respect of a loan on land, but of a contract relating to interest of money lent, and was therefore assessable in their hands to the income tax. LEEDS PERMANENT BENEFIT BUILDING SOCIETY *v.* MALLANDAINE C. A. 402

REVENUE—*continued.*

7. —— *Stamp—Conveyance on Sale—Exchange of Shares—Ad Valorem Stamp—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 55, 73.

By an instrument, entered into in pursuance of an agreement, a shareholder in one company transferred his shares to another company in exchange for certain shares in the latter company:—

Held, that the transaction was a conveyance on sale of the shares within ss. 54 and 55 of the Stamp Act, 1891, and that the instrument was therefore chargeable with an ad valorem stamp.

Judgment of the Queen's Bench Division, [1897] 1 Q. B. 778, affirmed. COATS (J. & P.) *v.* INLAND REVENUE COMMISSIONERS - C. A. 423

8. —— *Stamp—Debenture—Principal Sum repayable with Premium—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Sched. I.*

A limited company issued a series of debentures of 100*l.* each, each debenture containing an undertaking by the company to pay to the registered holder upon a specified date "the sum of 100*l.* together with a premium thereon at 7*l.* 10*s.*" The debentures were marketable securities not transferable by delivery within the meaning of Sched. I. of the Stamp Act, 1891:—

Held, that each debenture was a security for the payment by the company of 107*l.* 10*s.*, the amount of the principal and the premium, and was therefore liable to ad valorem stamp duty upon that amount. ROWELL *v.* INLAND REVENUE COMMISSIONERS - - - Div. Ct. 194

9. —— *Stamp—Security for Payment of Annuity—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87, *sub-s.* 2.

Sect. 87, sub-s. 2, of the Stamp Act, 1891, which provides that a security for the payment of any annuity by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid, does not apply to the case of a grant of a perpetual annuity in consideration of a sum of money paid by way of purchase.

The decision of Wills and Grantham JJ., [1897] 1 Q. B. 786, affirmed. MERSEY DOCKS AND HARBOUR BOARD *v.* INLAND REVENUE COMMISSIONERS - - - - C. A. 316

REVOCABLE MANDATE—Breach of trust—Fraudulent preference - - 19
See BANKRUPTCY. 3.

REVOCATION—Breach of contract by licensor—Licensee's right of action - - 445
See LICENCE.

RIVER—Moorings in foreshore—Immemorial user - - - - - 318
See SEASHORE.

—— Ownership of foreshore and bed of—Discovery—Right of the Crown - 384
See PRACTICE. 4.

—— Thames—Rights of owner of shore - 334
See THAMES.

ROAD—Penalty for not substituting road for road interfered with - - - 239
See RAILWAY

RULES OF SUPREME COURT—Order III., r. 6 (Indorsement of Claim) - - 66
See PRACTICE. 8.

—— **Order XIV., r. 1** (Judgment on Writ specially indorsed) - - - 66
See PRACTICE. 8.

—— **Order XXII., r. 6** (Payment into and out of Court) - - - - 516
See BANKRUPTCY. 8.

—— **Order XXXI., rr. 1, 2, 12** (Discovery and Inspection) - - - - 111
See PRACTICE. 2.

—— —— **r. 12** - - - - 124
See PRACTICE. 3.

—— —— **r. 18** - - - - 188
See PRACTICE. 6.

—— **Order XXXV., r. 4** (Proceedings in District Registries) - - - - 368
See PRACTICE. 1.

—— **Order LVII., r. 12** (Interpleader) - 362
See PRACTICE. 7.

—— **Order LXV., r. 27, sub-r. 41** (Costs) - 368
See PRACTICE. 1.

SALE—By sheriff—Notice of bankruptcy petition—Death—Administration - 521
See BANKRUPTCY. 1.

—— By trustee to partner of member of committee of inspection—Undervalue 8
See BANKRUPTCY. 7.

—— Conveyance on—Stamp—Exchange of shares
See REVENUE. 7. 423

—— Goods seized in execution—Interpleader
See PRACTICE. 7. 362

SAND—Right to take—Rights of owner of shore—"Bed of river" - - - 334
See THAMES.

SEAMAN—"Maintenance and passage home"—Merchant Shipping Act, 1894 - 327
See SHIP. 3.

SEA-SHORE—*Foreshore—Tidal and Navigable Waters—Right to fix Moorings as incident to Navigation—Immemorial User to fix moorings in Foreshore—Presumption of Legal Origin—Immemorial User in River Thames.*

An immemorial user of the foreshore in tidal and navigable waters, by the owners of fishing-boats and other craft, by fixing moorings in the soil, for the purpose of attaching their boats to them, may be supported either as an ordinary incident of the navigation of such waters, or on a presumption of a legal origin by grant from the Crown of the foreshore subject to such user, or by concession by a former owner of the foreshore to all persons navigating the waters to use it for fixing moorings.

Such an immemorial user in the River Thames may be supported on the presumption of regulations prescribed by the port authority of the port of London (per Rigby L.J.). ATTORNEY-GENERAL *v.* WRIGHT - - - - C. A. 318

SECURED CREDITOR—Payment into court as security for costs - - - 516
See BANKRUPTCY. 8.

SECURITY—For payment of annuity—Stamp
See REVENUE. 9. 316

SECURITY FOR COSTS—Payment into court as—Secured creditor - - - 516
See BANKRUPTCY. 8.

SEPARATION—Covenant not to molest—Divorce proceedings in foreign country - 547
See HUSBAND AND WIFE.

SERVANT—Continuous breach of contract—Remedies - - - - 180
See MASTER AND SERVANT.

SETTLED LAND—Mortgage of—Estate duty 47
See REVENUE. 3.

SETTLEMENT—Estate duty—Appointment—Subsequent surrender of life interest
See REVENUE. 2. 535

—— Estate duty—Exemption—"Disposition"
See REVENUE. 1. 373

—— Estate duty—Property passing on death
See REVENUE. 4. 102

SEWER—Nuisance—Jurisdiction of justices 76
See LONDON. 2.

—— Single drain draining several houses—Liability to repair - - - 543
See LOCAL GOVERNMENT. 2.

SHARES—Exchange of—Stamp—Conveyance on sale - - - - - 423
See REVENUE. 7.

SHERIFF—Sale by—Notice of bankruptcy petition—Death of judgment debtor - 521
See BANKRUPTCY. 1.

SHIP—*Charterparty—Discharge of Timber Cargo—Custom—Inconsistency with Contract—"To be taken from alongside at Merchants' Expense."*

A custom that, in discharging long lengths of timber from a ship, the shipowner is bound to put the timber into lighters brought alongside by the consignees is not inconsistent with a charterparty which provides that the timber shall be taken from alongside at merchants' expense. AKTIESELKAB HELIOS *v.* EKMAN & Co. - C. A. 83

2. —— *Charterparty—Ship to Load "always Afloat, as and where ordered by Charterers"—Insufficient Depth of Water in Dock—Detention of Ship.*

By a charterparty dated February 22, 1897, it was agreed between the plaintiffs, the shipowners, and the defendants, the charterers, that the plaintiffs' ship should proceed to the Senhouse Dock, Maryport, or so near thereunto as she might safely get, and there load in the customary manner, always afloat, as and where ordered by the charterers, a cargo of rails. The depth of water in the Senhouse Dock varied with the state of the tides, and was sufficient at spring tides, but was not sufficient at neap tides, for a ship of the size of the chartered vessel to load there always afloat, of which fact the plaintiffs were aware. The ship having got into the dock on February 28, the defendants on March 1 ordered her to a berth, to which she proceeded and loaded a portion of her cargo, but, owing to the spring tides coming to an end, the water in the dock began to fall, so that on March 7 it was obvious that the plaintiffs' ship would soon take the

SHIP—*continued.*

ground if she continued in the dock. She therefore left the dock, and was obliged to wait until the next spring tides. She re-entered the dock on March 16, and completed her loading :—

Held, by Lord Esher M.R. and Rigby L.J., A. L. Smith L.J. dissenting, that the order given by the defendants was such as they were entitled to give under the terms of the charterparty, and that they were not liable for the detention of the ship. CARLTON STEAMSHIP COMPANY *v.* CASTLE MAIL PACKETS COMPANY - - C. A. 485

3. —— *Seaman — Termination of Service Abroad—"Maintenance and Passage Home"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

By s. 186 of the Merchant Shipping Act, 1894, where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall, among other alternatives, either (*c*) provide him with a passage home, or (*d*) deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home.

Upon the discharge abroad of a British seaman, the consul, acting under clause (*d*), fixed a sum which he deemed sufficient to defray the expenses of the seaman's passage home, and the master deposited this sum with the consul, who provided the seaman with a voucher for a passage. The voucher for the passage did not include maintenance. In an action by the seaman against the shipowners to recover the expenses of his maintenance on the passage :—

Held, that the master, by depositing the sum fixed by the consul, had complied with the requirements of clause (*d*), and the shipowners were not liable :

Semble, a "passage home" in clause (*c*) means a passage to the port at which the seaman was shipped, or to some port in the United Kingdom agreed to by him.

The decision of Collins J., [1897] 1 Q. B. 712, affirmed. EDWARDS *v.* STEEL, YOUNG & Co. C. A. 327

—— Barratry of master—Mortgagee of ship—Perils of the sea - - - 311
See INSURANCE, MARINE. 1.

—— Ship surveyed while in dock for Lloyd's classification — Apportionment of expenses - - - - 456
See INSURANCE, MARINE. 3.

SOLICITOR—*Bill of Costs—Taxation—Sale of Property subject to Incumbrances—Sale by Second Mortgagee with Power of Sale—Costs of Vendor's Solicitor — Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I., r.* 9.

Rule 9 of Sched. I. of the General Order to the Solicitors' Remuneration Act, 1881, which provides that "where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money," applies to the case of a sale by a second mortgagee under his power of sale. FORTESCUE *v.* MERCANTILE BANK OF LONDON - - C. A. 236

SOLICITOR—*continued.*

2. —— *Compromise of Client's Claim by Solicitor—No Implied Authority before Action.*

A solicitor employed to act for a client in regard to his claim against a third person has, before action brought, no implied authority to effect a compromise.

Duffy v. *Hanson*, (1867) 16 L. T. 332, approved. MACAULAY *v.* POLLEY - - - C. A. 122

3. —— *Costs of Action—Partnership, Retainer by—Dormant Partners—Liability—Costs incurred after Dissolution of Partnership—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 17, *sub-s.* 2; *s.* 36, *sub-s.* 3.

The active partner in a firm consisting of himself and two dormant partners retained a solicitor to conduct an action for the recovery of a debt due to the firm. While the action was pending, the partnership was dissolved, and the dormant partners retired from the business. No notice of the dissolution was given to the solicitor, who did not know of the existence of the dormant partners, nor did the dormant partners do anything by way of withdrawing the retainer :—

Held, that the dormant partners were liable to the solicitor in respect of costs in the action incurred subsequently to the dissolution of partnership. COURT *v.* BERLIN - - C. A. 396

—— Bias — Disqualification — Adjudication by ordinary member of Incorporated Law Society - - - - 468
See JUSTICES.

STAMP — Conveyance on sale — Exchange of shares - - - - 423
See REVENUE. 7.

—— Debenture—Principal sum repayable with premiums - - - - 194
See REVENUE. 8.

—— Security for payment of annuity - 316
See REVENUE. 9.

STATUTES :—

33 Hen. 8, c. 9, s. 9—*Gaming* - - 527
See GAMING. 1.

2 Geo. 2, c. 28, s. 9—*Gaming* - - 527
See GAMING. 1.

7 Will. 4 and 1 Vict. c. 28—*Real Property Limitation* - - - - 143
See LIMITATIONS, STATUTE OF.

5 & 6 Vict. c. 44, s. 1—*Ale House* - 37
See LICENSING ACTS. 3.

5 & 6 Vict. c. 45, ss. 13, 24—*Copyright* - 1
See COPYRIGHT.

8 & 9 Vict. c. 20, ss. 53, 54—*Railways Clauses*
See RAILWAY. 239

8 & 9 Vict. c. 109, ss. 3, 6, First Schedule—*Gaming* - - - - 527
See GAMING. 1.

10 & 11 Vict. c. 17, s. 68—*Waterworks Clauses*
See WATERWORKS. 209

15 & 16 Vict. c. 76, s. 214—*Common Law Procedure* - - - - 66
See PRACTICE. 8.

16 & 17 Vict. c. 34, s. 2, Sched. D—*Income Tax*
See REVENUE. 6. 402

16 & 17 Vict. c. 119, ss, 1, 3—*Betting* - 242
See GAMING. 2.

STATUTES—*continued.*

16 & 17 Vict. c. 119, ss. 1, 2, 3, 11 - - 527
See GAMING. 1.

17 & 18 Vict. c. 38, s. 4—*Gaming* - 199
See GAMING. 3.

18 & 19 Vict. c. 120, s. 58—*Metropolis Management* - - - - - 70
See LONDON. 1.

28 & 29 Vict. c. 104, ss. 13, 14, 15, 16—*Crown Suits, &c.* - - - - 384
See PRACTICE. 4.

35 & 36 Vict. c. 94, s. 3—*Licensing* - 37
See LICENSING ACTS. 3.

—— —— s. 12 - - - - 33
See LICENSING ACTS. 2.

—— —— s. 50 - - - - 308
See LICENSING ACTS. 1.

37 & 38 Vict. c. 68, s. 12—*Attorneys and Solicitors* - - - - 468
See JUSTICES.

38 & 39 Vict. c. 55, s. 36—*Public Health* 357
See LOCAL GOVERNMENT. 3.

—— —— s. 41 - - - - 543
See LOCAL GOVERNMENT. 2.

—— —— s. 157 - - - - 433
See LOCAL GOVERNMENT. 1.

38 & 39 Vict. c. 90, s. 4—*Employers and Workmen* - - - - - 180
See MASTER AND SERVANT.

41 & 42 Vict. c. 33, ss. 6 (*c*), 7, 37—*Dentists* 203
See MEDICAL PRACTITIONER.

41 & 42 Vict. c. 77, s. 32—*Highways and Locomotives* - - - - 482
See LOCOMOTIVE.

43 & 44 Vict. c. 42, s. 4—*Employers' Liability* 6
See COUNTY COURT. 2.

44 & 45 Vict. c. 41, s. 14—*Conveyancing* 218
See LANDLORD AND TENANT. 2.

44 & 45 Vict. c. 44, General Order, Sched. I., r. 9—*Solicitors' Remuneration* - 236
See SOLICITOR. 1.

45 & 46 Vict. c. 43, s. 7—*Bills of Sale* - 461
See BANKRUPTCY. 6.

46 & 47 Vict. c. 52, s. 37—*Bankruptcy* - 439
See BANKRUPTCY. 5.

—— —— s. 44, sub-s. iii. - - - 461
See BANKRUPTCY. 6.

—— —— ss. 45, 125, sub-s. 6 - - 521
See BANKRUPTCY. 1.

—— —— ss. 45, 168 - - - 516
See BANKRUPTCY. 8.

—— —— s. 48 - - - - - 16
See BANKRUPTCY. 2.

46 & 47 Vict. c. 61, s. 61—*Agricultural Holdings* - - - - - 475
See LANDLORD AND TENANT. 1.

51 & 52 Vict. c. 41, s. 85—*Local Government* 452
See BICYCLE.

51 & 52 Vict. c. 43, ss. 154, 160—*County Courts* 429
See COUNTY COURT. 1.

51 & 52 Vict. c. 64, s. 5—*Libel* - - 159
See LIBEL. 1.

STATUTES—*continued.*

53 & 54 Vict. c. 39, s. 2, sub-s. 3 (*d*), s. 3—*Partnership* - - - 495
See PARTNERSHIP.

—— —— s. 17, sub-s. 2; s. 36, sub-s. 3 396
See SOLICITOR. 3.

53 & 54 Vict. c. 59, s. 19—*Public Health* 543
See LOCAL GOVERNMENT. 2.

—— —— s. 23 - - - - 433
See LOCAL GOVERNMENT. 1.

53 & 54 Vict. c. 71, s. 11, sub-s. 2—*Bankruptcy* 521
See BANKRUPTCY. 1.

54 & 55 Vict. c. 39, ss. 54, 55, 73—*Stamps* 423
See REVENUE. 7.

—— —— ss. 54, 60, 87, sub-s. 2 - - 316
See REVENUE. 9.

—— —— s. 86, Sched. I. - - - 194
See REVENUE. 8.

54 & 55 Vict. c. 76, s. 2, sub-s. 1 (*b*)—*Public Health, London* - - - 76
See LONDON. 2.

55 & 56 Vict. c. 13, s. 4—*Conveyancing* - 218
See LANDLORD AND TENANT. 2.

55 & 56 Vict. c. 32, s. 8—*Clergy Discipline* 414
See ECCLESIASTICAL LAW.

57 & 58 Vict. c. 30, s. 1, s. 2, sub-s. 1 (*b*)—*Finance Act* - - - - 535
See REVENUE. 2.

—— —— ss. 1, 2, 5 - - - 102
See REVENUE. 4.

—— —— ss. 1, 2, 21, sub-s. 1 - - 373
See REVENUE. 1.

—— —— s. 2, sub-s. 1 (*b*); s. 7, sub-s. 1 (*a*), sub-s. 7 (*b*) - - - - 47
See REVENUE. 3.

57 & 58 Vict. c. 60, s. 186—*Merchant Shipping* 327
See SHIP. 3.

57 & 58 Vict. c. clxxxvii., ss. 87, 238—*Thames Conservancy* - - - - 334
See THAMES.

58 & 59 Vict. c. 27, s. 4—*Market Gardeners' Compensation* - - - 475
See LANDLORD AND TENANT. 1.

STEAM-ROLLER — Licence — "Used" within the county - - - - 482
See LOCOMOTIVE.

SUBSIDENCE—Liability of lessee—Compensation clause - - - - 165
See MINE.

SURRENDER—Of life interest in favour of remainderman—Estate duty - 535
See REVENUE. 2.

TAX (INCOME)—Benefit society—"Interest of money" lent to borrowing member 402
See REVENUE. 6.

TAXATION—Costs—District registry—Retaxation - - - - - 368
See PRACTICE. 1.

—— Costs—Sale of property subject to incumbrances - - - - 236
See SOLICITOR. 1.

TENANT—Market gardeners' compensation—"Contract of tenancy" - - 475
See LANDLORD AND TENANT. 1.

THAMES—*Conservators—Right to take Sand—Rights of Owner of Shore—"Bed of the Thames"—"Bed of River"—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 87, 238.

Sect. 87 of the Thames Conservancy Act, 1894, makes it unlawful for any person other than the conservators, their agents, &c., to dredge or raise any gravel, sand, ballast, or other substance from "the bed of the Thames" except with the licence of the conservators:—

Held, that the expression "bed of the Thames" in the section, as applied to the tidal portion of the river, means the soil between the ordinary high water mark on one side and the ordinary high water mark on the other side; and that the right of the owner of the soil to take gravel, &c., between high and low water mark is not preserved by s. 238 of the Act.

Semble, the conservators can only exercise their powers of dredging and granting licences for dredging for the purposes of the Act, i.e., for the maintenance and improvement of the navigation.

Ordinary meaning of "bed of river" defined.

Pearce v. *Bunting*, [1896] 2 Q. B. 360, disapproved of. THAMES CONSERVATORS *v.* SMEED, DEAN & Co. - - - - C. A. 334

—— Moorings in foreshore—Immemorial user in River Thames - - - 318
See SEA-SHORE.

TOTAL LOSS—Capture—Notice of abandonment—Recovery of ship - - 135
See INSURANCE, MARINE. 2.

TRUST—Conveyance to make good breaches of—Fraudulent preference - - 19
See BANKRUPTCY. 3.

TRUSTEE IN BANKRUPTCY—Sale by, to partner of member of committee of inspection—Undervalue - - - 8
See BANKRUPTCY. 7.

UNDERLESSEE—Relief of, under forfeiture—Breach of covenant - - 218
See LANDLORD AND TENANT. 2.

UNDERVALUE—Sale by trustee to partner of member of committee of inspection 8
See BANKRUPTCY. 7.

USER—Immemorial, to fix moorings in foreshore—Presumption of legal origin - 318
See SEA-SHORE.

VESTRY—Approval of acts of committee by—Ratification - - - - 70
See LONDON. 1.

WATER-CLOSETS—Power to require sufficient, to be provided—Notice to abate nuisance - - - - - 357
See LOCAL GOVERNMENT. 3.

WATERWORKS—*Rate—Annual Value—Assessment—"Tenement supplied with Water"—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68.

On an application, under s. 68 of the Waterworks Clauses Act, 1847, to determine a dispute as to the value of a tenement supplied with water, consisting of a dwelling-house and garden with outhouses, occupied as a residence, and comprising about half an acre, the justices found as a fact that a portion of the garden might be separately let, and being of opinion that, in arriving at the annual value of the tenement supplied with water, they had to determine what quantity of garden should reasonably go with the house, they held that the annual value was the value of the premises exclusive of such portion as might be separately let.

On a case stated:—

Held, that the justices had no jurisdiction to exclude that portion of the garden, and the assessment must be raised to the annual value of the whole of the premises as occupied. GRAND JUNCTION WATERWORKS COMPANY *v.* DAVIES Div. Ct. 209

WIFE—Separation—Covenant not to molest—Divorce proceedings in foreign country
See HUSBAND AND WIFE. 547

WORDS—"Bed of river" - - - 334
See THAMES.

—— "Company's policy" - - - 93
See INSURANCE, MARINE. 4.

—— "Contract of tenancy" - - 475
See LANDLORD AND TENANT. 1.

—— "Disposition" - - - - 373
See REVENUE 1.

—— "Interest of money" - - - 402
See REVENUE. 6.

—— "Off-licence" - - - - 308
See LICENSING ACTS. 1.

—— "Passage home" - - - 327
See SHIP. 3.

—— "Place" used for betting - - 242
See GAMING. 2.

—— "Statutory defence" - - - 6
See COUNTY COURT. 2.

—— "To be taken from alongside at merchants' expense" - - - - 83
See SHIP. 1.

—— "Used" within the county - - 482
See LOCOMOTIVE.

WRIT—Special indorsement on—Recovery of mesne profits - - - 66
See PRACTICE. 8.

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